NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS

Congressional Information Service
Washington, D.C.

S. Hrg. 100-1082

THE PERFORMANCE OF THE REAGAN ADMINISTRATION IN NOMINATING WOMEN AND MINORITIES TO THE FEDERAL BENCH

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

THE PERFORMANCE OF THE REAGAN ADMINISTRATION IN NOMINATING WOMEN AND MINORITIES TO THE FEDERAL BENCH

FEBRUARY 2, 1988

Serial No. J-100-47

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
99-591 WASHINGTON : 1990

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-13

COMMITTEE ON THE JUDICIARY

JOSEPH R. BIDEN, Jr., Delaware, *Chairman*

EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

STROM THURMOND, South Carolina
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
GORDON J. HUMPHREY, New Hampshire

Mark H. Gitenstein, *Chief Counsel*
Diana Huffman, *Staff Director*
Terry L. Wooten, *Minority Chief Counsel*
R.J. Duke Short, *Minority Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

Page

Kennedy, Hon. Edward M 1
Metzenbaum, Hon. Howard 8
Simpson, Hon. Alan K 9
Hatch, Hon. Orrin G 11
Humphrey, Hon. Gordon J 13
Leahy, Hon. Patrick J 36
Simon, Hon. Paul 182

CHRONOLOGICAL LIST OF WITNESSES

Stephen, J. Markman, Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice 18
Panel consisting of: Hon. Judith C. Chirlin, National Association of Women Judges; Estelle H. Rogers, national director, Federation of Women Lawyers, Judicial Screening panel; and Thomas Duckenfield, vice president, National Bar Association 124
Panel consisting of: Wiley A. Branton, partner, Sidley & Austin, Washington, DC; Robert E. Jordan III, president, District of Columbia Bar; Martha Saenz-Schroeder, president, Women's Bar Association of the District of Columbia; Iverson O. Mitchell III, past president, Washington Bar Association 200

ALPHABETICAL LIST AND SUBMITTED MATERIAL

Branton, Wiley, A.:
  Testimony 200
  Prepared statement 202
  Response to questions 205
Chirlin, Judith C.:
  Testimony 124
  Prepared statement 128
  Revised statement 193
Duckenfield, Thomas:
  Testimony 168
  Prepared statement 171
    Attachments 176
Jordan, Robert E., III:
  Testimony 207
  Prepared statement 209
  Prepared statement of Paul L. Friedman 213
Kennedy, Hon. Edward M.:
  Chart A—Nominations of Women and Minorities during the administrations of Carter and Reagan 2
    Race and gender 3
  Chart B—Women and Minorities in the Legal Profession 6
  Chart C—President Reagan's Federal Court Nominees 7
Markman, Stephen J.:
  Testimony 18
  Prepared statement 45
  Response to questions 113

Page
Mitchell, Iverson O., III:
    Testimony 237
    Prepared statement 239
Rogers, Estelle H.:
    Testimony 140
    1978 Executive Order 141
    Article by Elaine Martin entitled "Gender and Judicial Selection: A Comparison of the Reagan and Carter administrations 145
    Prepared statement 154
    Response to questions 163
Saenz-Schroeder, Martha:
    Testimony 227
    Prepared statement 230
    Response to questions 235
Simon, Hon. Paul: Statement before the National Press Club, Mar. 10, 1986 185

THE PERFORMANCE OF THE REAGAN ADMINISTRATION IN NOMINATING WOMEN AND MINORITIES TO THE FEDERAL BENCH

TUESDAY, FEBRUARY 2, 1988

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Edward M. Kennedy (acting chairman) presiding.

Also present. Senators Metzenbaum, Leahy, Hatch, Grassley, Specter, and Humphrey.

Staff present. Jeff Blattner, counsel; Melinda Nielsen, chief clerk; Carolyn Osolinik, chief counsel.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. We will come to order.

The most distinctive feature of our constitutional system is our independent Federal judiciary, on which we rely to protect our most fundamental liberties and rights. In America, the Federal judiciary is the forum of last resort for those who have been treated unfairly. It is one of the most important strands in the fabric that holds America together.

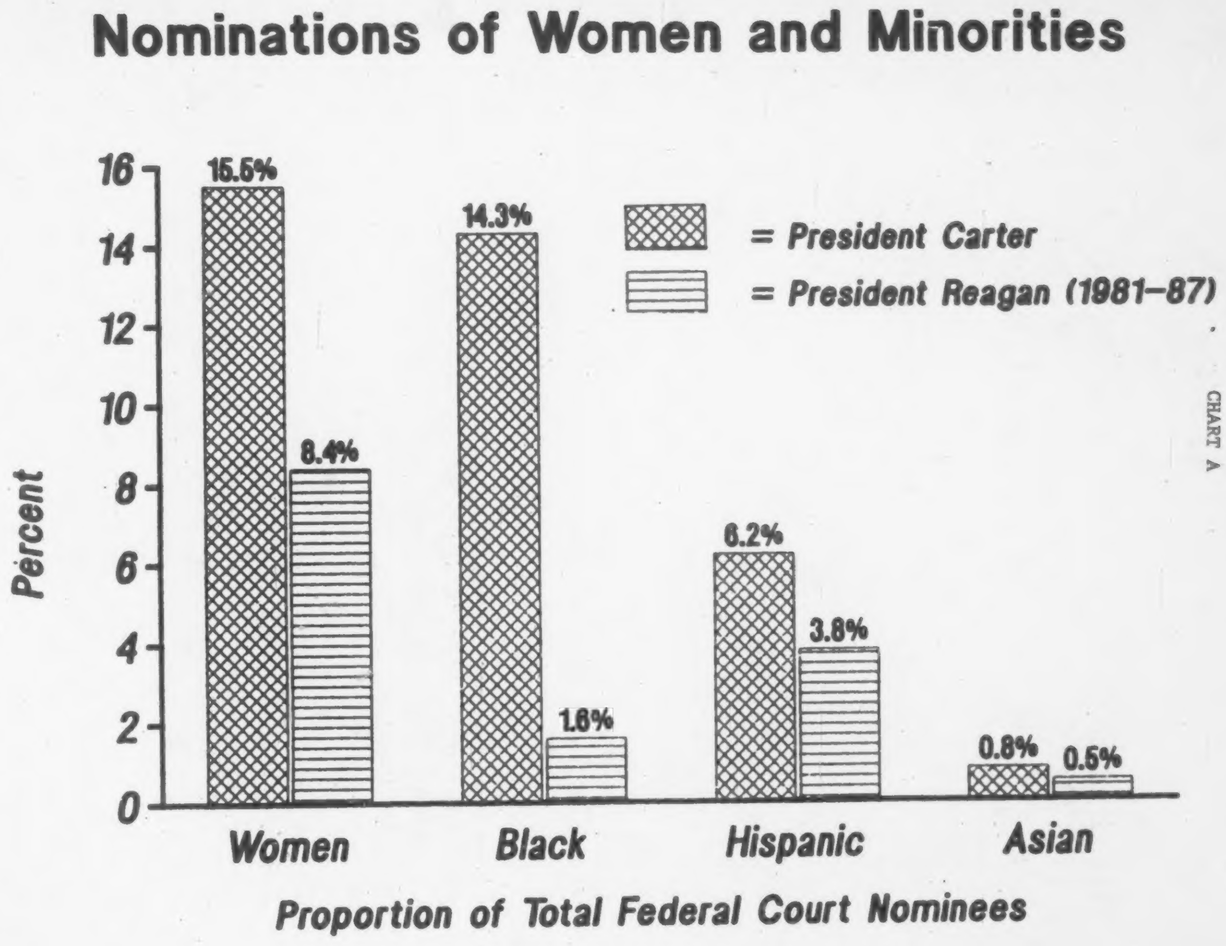
It is, therefore, vitally important that all groups in our society have confidence in the fairness and the openness of the Federal judiciary. That confidence cannot exist if the Federal courts are perceived to be the exclusive bastion of any single group in our society.

Over the past several years, many members of this committee have expressed concern about the performance of the Reagan administration in nominating women and minorities to the Federal bench. Last summer, I asked Chairman Biden to call a hearing in which the committee could examine the administration's record, and I want to thank Chairman Biden for agreeing to have this hearing today.

As you can see from Chart A, a copy of which I will have inserted in the record, the Reagan administration has appointed far fewer women and minorities to the Federal bench than did the previous administration.

[The chart of Senator Kennedy follows:]

CHART A


Nominations of Women and Minorities
= President Carter
= President Reagan (1981–87)
Percent
16
14
12
10
8
6
4
2
0
15.5%
8.4%
14.3%
1.6%
6.2%
3.8%
0.8%
0.5%
Women
Black
Hispanic
Asian
Proportion of Total Federal Court Nominees

JUDICIAL NOMINATIONS BY RACE AND GENDER: PRESIDENTS CARTER AND REAGAN (1981-87)

SUPREME, CIRCUIT AND DISTRICT COURTS

	PRESIDENT REAGAN						PRESIDENT CARTER	
	1981-86	(%)	1987	(%)	Total 1981-87	(%)	Total 1977-80	(%)
White	274	93.5%	71	95.9%	345	94.0%	203	78.7%
Black	5	1.7%	1	1.4%	6	1.6%	37	14.3%
Hispanic	13	4.4%	1	1.4%	14	3.8%	16	6.2%
Asian	1	0.3%	1	1.4%	2	0.5%	2	0.8%
TOTAL	293	100.0%	74	100.0%	367	100.0%	258	100.0%
Men	266	90.8%	70	94.6%	336	91.6%	218	84.5%
Women	27	9.2%	4	5.4%	31	8.4%	40	15.5%
TOTAL	293	100.0%	74	100.0%	367	100.0%	258	100.0%

SUPREME COURT

	1981-86	(%)	1987	(%)	Total 1981-87	(%)	Total 1977-80	
White	3	100.0%	2	100.0%	5	100.0%	0	
Black	0	0.0%	0	0.0%	0	0.0%	0	
Hispanic	0	0.0%	0	0.0%	0	0.0%	0	
Asian	0	0.0%	0	0.0%	0	0.0%	0	
TOTAL	3	100.0%	2	100.0%	5	100.0%	0	
Men	2	66.7%	2	100.0%	4	80.0%	0	
Women	1	33.3%	0	0.0%	1	20.0%	0	
TOTAL	3	100.0%	2	100.0%	5	100.0%	0	

CIRCUIT COURTS

	1981-86	(%)	1987	(%)	Total 1981-87	(%)	Total 1977-80	(%)
White	64	97.0%	19	100.0%	83	97.6%	44	78.6%
Black	1	1.5%		0.0%	1	1.2%	9	16.1%
Hispanic	1	1.5%		0.0%	1	1.2%	2	3.6%
Asian		0.0%		0.0%	0	0.0%	1	1.8%
TOTAL	66	100.0%	19	100.0%	85	100.0%	56	100.0%
Men	60	90.9%	18	94.7%	78	91.8%	45	80.4%
Women	6	9.1%	1	1.5%	7	8.2%	11	19.6%
TOTAL	66	100.0%	19	100.0%	85	100.0%	56	100.0%

DISTRICT COURTS

	1981-86	(%)	1987	(%)	Total 1981-87	(%)	Total 1977-80	(%)
White	207	92.4%	50	94.3%	257	92.8%	159	78.7%
Black	4	1.8%	1	1.9%	5	1.8%	28	13.9%
Hispanic	12	5.4%	1	1.9%	13	4.7%	14	6.9%
Asian	1	0.4%	1	1.9%	2	0.7%	1	0.5%
TOTAL	224	100.0%	53	100.0%	277	100.0%	202	100.0%
Men	204	91.1%	50	94.3%	254	91.7%	173	85.6%
Women	20	8.9%	3	5.7%	23	8.3%	29	14.4%
TOTAL	224	100.0%	53	100.0%	277	100.0%	202	100.0%

NOTE: Includes Nominees Confirmed (1981-86) and All Nominees (1987)

Senator Kennedy. Of the administration's 367 nominations, only six—or 1.6 percent—have gone to black nominees; by contrast, 14.3 percent of President Carter's Federal court nominees were black. Similarly, only 8.4 percent of President Reagan's judicial nominees were women, while 15.5 percent of President Carter's nominations were women. This pattern is reflected across the board, for all racial minorities, and at all levels of the Federal judiciary.

And there are some very stark examples. Every single one of the 14 persons this administration has nominated to the Federal bench in Washington is a white male. This situation is particularly unacceptable because, of the 45,000 lawyers in Washington, over 10,000 are women and more than 3,000 are black or Hispanic. No city in the country has more women and minority lawyers in its law firms or in government service. Certainly, many of these individuals would be very well qualified to serve on the Federal bench.

There are similar examples in courts across the country. All nine of the administration's nominations to the sixth circuit were white males, as were all eight of its nominations to the seventh circuit, and all six of its nominations to the eighth circuit.

These statistics make it clear that the Reagan administration has abandoned all pretense of promoting diversity in the Federal judiciary. Indeed, we will hear testimony today that the Reagan administration has never made a real effort to find qualified women and minorities to nominate to the Federal bench. The record suggests that in making nominations, the administration looks largely to a narrow cadre of white males who share its hard-line judicial philosophy. While the President is surely entitled to appoint nominees who are mainstream conservatives, he should not be permitted to homogenize the Federal judiciary.

In criticizing the Reagan administration's record, I want to make it clear that I do not advocate the use of "quotas" for judicial nominations. But it is vitally important that all Americans have confidence that the Federal judiciary is not an exclusive club open only to white males. And that can only happen if the administration makes an honest effort to find and nominate well-qualified women and minorities to the Federal bench.

We will hear today from a very able representative of the administration and from many other distinguished witnesses. I look forward to their testimony.

Just to point out, these two charts here indicate quite dramatically what the contrast has been with the previous administration, both the numbers of minorities, the women, Hispanic and Asian. Chart B indicates what has happened over the period since 1970 to 1985 in terms of the numbers of women and minority and Hispanic in the total legal profession. So you have seen a dramatic increase from a number of years ago in 1970. Even in 1980, we had about half the number of women and minorities in the legal professions, and still you have about double the numbers of women and minorities that have been appointed to the Federal and circuit bench. I think that that is also reflected.

We have a third chart. Chart C here indicates what has happened in the most recent time—we can see whether the administration's record has been actually getting better or poorer. And we find out that if you look at 1981 to 1986 and compare it to the record in the very last year, 1987, the nominees that are currently before us, we find out that the record, instead of improving, has actually deteriorated at the end of the 7 years. Those figures, I think, are fairly reflective of what has been the administration's attitude. I ask that Charts B and C be included in the record.

[Charts B and C follow:]

CHART B

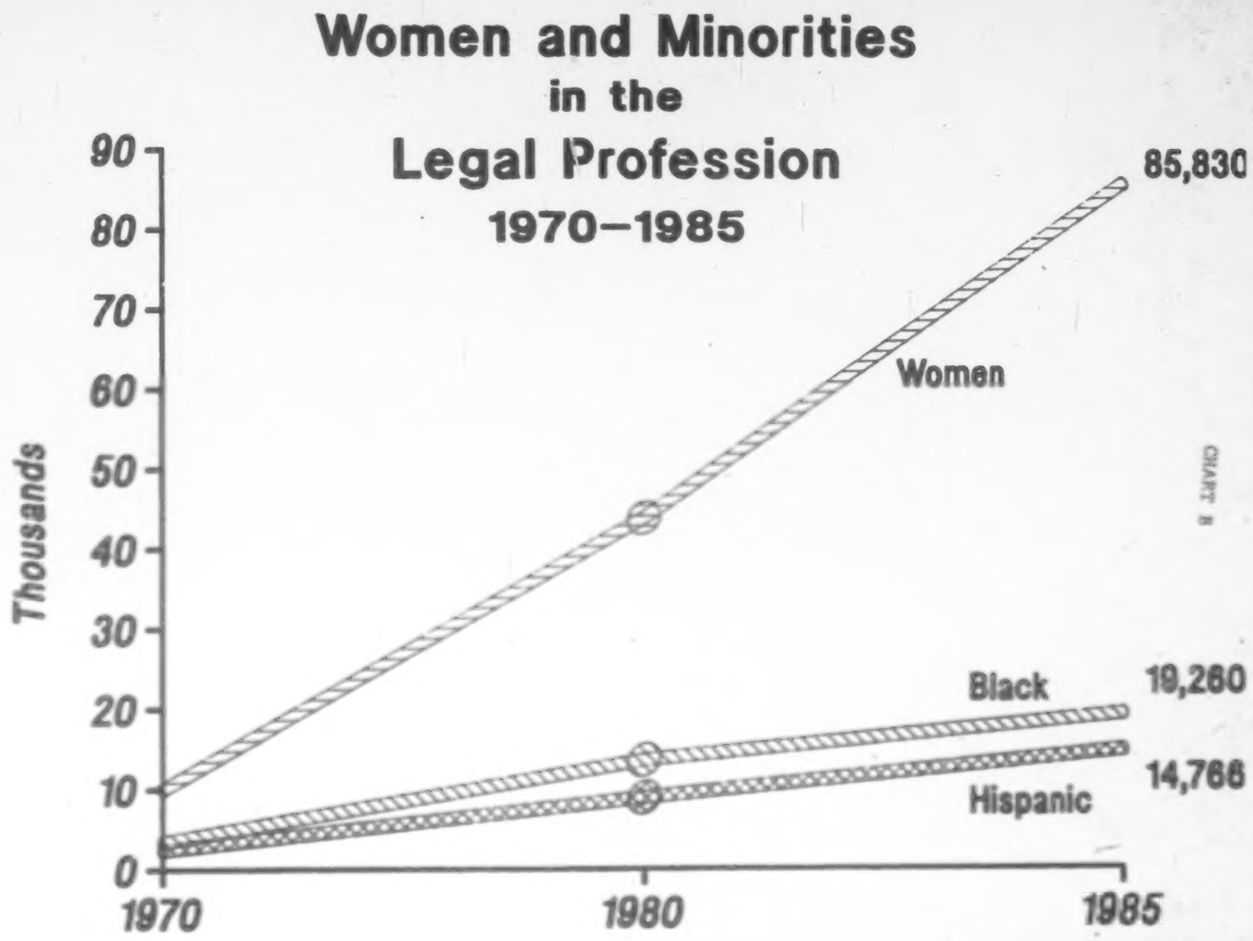
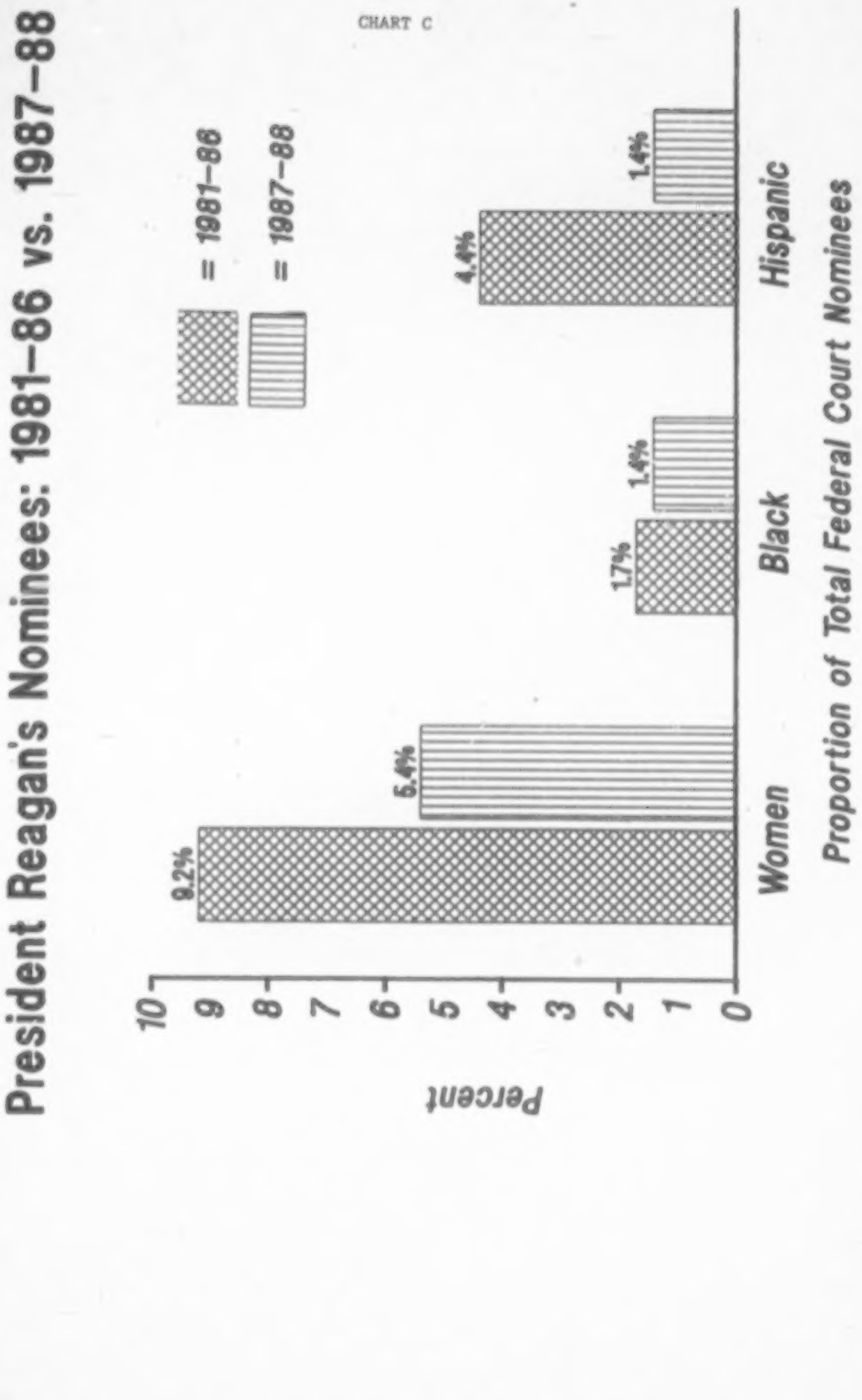

Women and Minorities
in the
Legal Profession
1970–1985
Thousands
90
80
70
60
50
40
30
20
10
0
1970
1980
1985
Women
85,830
Black
19,260
Hispanic
14,766

CHART C


President Reagan's Nominees: 1981–86 vs. 1987–88
▩ = 1981–86
▤ = 1987–88
Percent
10
9
8
7
6
5
4
3
2
1
0
9.2%
5.4%
1.7%
1.4%
4.4%
1.4%
Women
Black
Hispanic
Proportion of Total Federal Court Nominees

Senator **Kennedy**. Senator Metzenbaum has asked me to state that he shares our concern of the lack of diversity in the judicial appointees. He is in the Labor Subcommittee hearing. He will be over shortly. I will put his full statement in the record.

Also, I have statements of Senators Simpson and Hatch for the record.

[The prepared statements follow:]

Prepared Statement of Senator Howard Metzenbaum

I want to commend Senator Kennedy for his commitment to holding a hearing on the judicial selection process. The record of the administration shows that such a hearing is essential.

Since 1981, the Reagan administration has filled 343 vacancies on our Federal courts. A very small number of these nominees have been women, blacks, and Hispanics. I am one who believes that the Federal judiciary should include qualified persons from all ethnic groups and should include women as well as men. The Federal judiciary symbolizes justice in this country. If all groups are to have confidence in the judiciary, and if all members of all groups in our society are to have an equal opportunity to serve their country, we must insure that qualified minorities and women are systematically sought out for Federal judicial service.

The record of the Reagan administration in appointing judges to the Federal courts in the District of Columbia is particularly appalling. Not a single black has been nominated to fill a single one of the 14 vacancies which have arisen in these courts. Of the 45,000 members of the District of Columbia bar, over 3,000 are minorities and over 8,000 are female. Three women have been appointed to the Federal circuit, but no women or minorities have been appointed to fill the vacancies which have arisen on the Federal District Court for the District of Columbia or the Court of Appeals for the District of Columbia.

When Edwin Meese was confirmed as Attorney General, and when Steve Markman was confirmed as Assistant Attorney General for the Office of Legal Policy, both promised to work toward the appointment of women and minorities to the Federal bench. When Attorney General Meese was confirmed in 1985, he defended the record of the Reagan administration to date, and promised to find more women and minorities. General Meese said that the Reagan administration "has done its best to find minorities for court appointments * * *" and that the administration has had "a better record than virtually any of the past several Presidents." His promise to the Senate was this:

"[I]f I am confirmed, I will make the greatest search to try and find as many qualified people from all minority groups for presentation to the President for judgeships."

Later, that same year, when Assistant Attorney General Markman was confirmed he promised me that he would take steps to open up the nomination process including consultation on a regular basis with the National Bar Association and the Federation of Women Lawyers.

After 7 years of nominations by the Reagan administration, the record of the administration makes it difficult to believe that this administration has a commitment to a more representative judiciary. Women have been only 8.4 percent of the nominees and blacks, 1.6 percent. I do not advocate the idea that a certain percentage of women or minorities ought to be appointed to the Federal bench. But I do say that when so few have been appointed nationwide, and so few appointed in the District, this Senate and the people of this country deserve a clear explanation. That is what there hearings are about.

STATEMENT OF SENATOR ALAN K. SIMPSON
JUDICIAL SELECTION PROCESS OVERSIGHT HEARING

Senate Judiciary Committee

February 2, 1988

Mr. Chairman, I thank you for this opportunity to make a few statements regarding this hearing. It is good to see Assistant Attorney General Markman here today, along with the other witnesses who will appear before the committee. I look forward to receiving their testimony. I must say, however, that the Reagan Administration has been doing an admirable job in placing qualified women and minorities in the Federal Judiciary. The word to emphasize there is "qualified." While it is true that women and minorities will only add to the quality of our federal judiciary as their ranks grow, that laudable goal should not be achieved through an artificial quota system which disregards the qualifications of each nominee for a particular vacancy.

The statistics are certainly bandied about in a hearing like this but I think there are several which need further attention. President Reagan has appointed more women and minorities to the bench than Presidents Johnson, Nixon, or Ford. Only the Carter Administration appointed more women or minorities in recent years and this, it has been admitted, was achieved by an artificial quota system which sacrificed, in some cases, the qualifications necessary for the job. I support the Reagan Administration's position of looking for qualified women and minorities to fill vacancies on the Federal Judiciary.

This Administration does not attempt to extract promises from nominees or subject a nominee to a political litmus test. Rather, it reviews candidates for nomination with a "color blind," even-handed, fair approach. Just one example points to the validity of this assertion. William Dwyer, a Democrat, was twice nominated by President Reagan and actively supported by the President until recent confirmation of the nomination for the Federal District Court in Washington State.

I am confident that the Justice Department will continue to put forth names of qualified women and minorities as these groups continue to expand in number and qualification. I also note that, currently, the nominations of two women are pending before this Committee and the Senate as a whole for action -- action which has been unduly delayed in both cases. If this Committee is serious about increasing the number of women and minorities on the federal bench, a good place to start would be with those two nominations.

WGM/dc

From the office of

SEN. ORRIN HATCH

Washington, D.C. 20510

February 2, 1988 Contact: Paul Smith, 202/224-9854

STATEMENT OF SEN. ORRIN G. HATCH
BEFORE THE SENATE JUDICIARY COMMITTEE
JUDICIAL SELECTION PROCESS OVERSIGHT

Over the past several months, this committee has had several opportunities to reflect on one of its most important tasks — the confirmation of life-tenured federal judges. With these experiences fresh in mind, I would like to commend the chairman for offering this further opportunity to examine the process by which federal judges are chosen.

During the hearings associated with both Judge Bork and Judge Kennedy, many questions about the role of the American Bar Association arose. The questions pertained to statements made in the press by members of the ABA's screening panel. In confidentiality, these statements also betrayed political and ideological biases on the part to members of the panel who refused to be identified.

We are all aware of the importance attached to ABA assessments of judicial qualifications. Because ABA proceedings are wrapped in such an impenetrable cloak of secrecy, the only way to hold the ABA accountable for the fairness and impartiality of their screenings may be through oversight hearings in this committee.

During the Kennedy hearings, I remember that Chairman Biden seemed willing to inquire further into the ABA's processes. Has the Chairman given further consideration to offering the ABA an opportunity to explain their process and to answer questions about the propriety of some recent investigations?

As one senator with a strong commitment to finding qualified federal judges and to ensuring that the selection process is not encumbered with partisan or ideological considerations, I would express my hope that the committee could schedule a hearing to examine the ABA process.

In connection with our mutual goal that the judicial selection process operate free of inappropriate partisan influences, I want to particularly take this opportunity to commend Chairman Biden for his willingness to keep the approval process for nominees working throughout this election season. The federal judiciary is our government's single non-political branch. To maintain the judiciary's independence and integrity, it is our responsibility to ensure that the judicial selection and confirmation process proceeds without undue political pressure or influence. In this sense, Chairman Biden's message sends the correct signal that judges will not be treated as political footballs or exploited for partisan gain.

###

Senator **Kennedy**. I will recognize the Senator from Iowa. Do you want to make any brief comments?

Senator **Grassley**. No, Mr. Chairman. I don't have an opening statement.

Senator **Kennedy**. The Senator from New Hampshire.

Senator **Humphrey**. Mr. Chairman, I will abbreviate my statement and with the Chairman's consent place it in the record entirely.

These records apparently reflect the view of some Senators that the Reagan administration's record of appointing female and minority judges is inadequate. I for one reject that claim. This administration has appointed 30 women and 22 minority persons to the Federal courts. A recent scholarly study on gender and judicial selection concludes that while the Reagan administration has not equaled President Carter's efforts at explicit affirmative action in judicial appointments, nonetheless "Reagan's record of women appointments is exemplary compared to those of Presidents Ford, Nixon and Johnson." And that is the study by Martin on "Gender and judicial selection: a comparison of the Reagan and Carter administrations."

I would stress that the confirmation of two of President Reagan's female nominees—Susan Liebeler for the Court of Appeals for the Federal Circuit and Susan Conlon for the U.S. District Court in Illinois—have been unconscionably delayed by this committee.

Senator **Kennedy**. We will include the Senator's entire statement in the record.

[The prepared statement of Senator Humphrey follows:]

SENATE JUDICIARY COMMITTEE
HEARINGS ON JUDICIAL SELECTION PROCESS
FEBRUARY 2, 1988

STATEMENT OF SENATOR GORDON J. HUMPHREY

Like all fair Americans, I believe that our federal judiciary should be open to qualified candidates of both sexes and of all races, religions, and ethnic groups.

For too many years, the federal bench was for all practical purposes the exclusive preserve of white males. But just as such irrational and inequitable barriers have fallen in other areas of American life, the federal judiciary has benefitted from the great influx of female, minority, and ethnic group judges that has occurred over the past 30 years.

Diversification of the federal bench has been a bipartisan accomplishment. Lyndon Johnson appointed Thurgood Marshall as the first Black American to the Supreme Court. Ronald Reagan appointed Sandra Day O'Connor as the first female Supreme Court Justice and Antonin Scalia became the fist American of Italian extraction to sit on the High Court.

In recent years, racial, ethnic, and gender diversification has increased dramatically in the lower federal courts as well. While President Carter appointed a greater proportion of female and minority judges by following an explicit policy of goals or quotas, President Reagan has named substantial numbers of female and minority judges without resorting to race- or gender-conscious selection preferences. I strongly believe that President Reagan's approach is sounder.

These hearings apparently reflect the view of some senators that the Reagan Administration's record of appointing female and minority judges is inadequate. I reject that claim. This Administration has appointed 30 women and 22 minority persons to the federal courts. A recent scholarly study on gender and judicial selection concludes that while the Reagan Administration has not equalled President Carter's explicit affirmative action, "Reagan's record of women appointments is exemplary compared to those of Presidents Ford, Nixon, and Johnson". (Martin, "Gender and Judicial Selection: A Comparison of the Reagan and Carter Administrations", Judicature, Oct/Nov 1987, pp. 136-37).

I would also stress that the confirmation of two of President Reagan's female nominees -- Susan Liebeler for the Court of Appeals for the Federal Circuit and Susan Conlon for the U.S. District Court in Illinois -- have been unconscionably delayed by this very Judiciary Committee. I find it highly ironic that the same Committee that criticizes the Administration for not appointing enough female judges is so reluctant to confirm these nominees who are women.

The true objection of some senators is that this Administration has declined to embrace the policy of explicit race and gender criteria for the federal bench which was followed by the last Administrastion. President Carter candidly stated his judicial selection policy as follows:

> "If I didn't have to get Senate confirmation of appointees, I could tell you flatly that 12 percent of my appointees would be Black and 3 percent would be Spanish-speaking and 40 percent would be women and so forth."

President Carter largely followed through on his policy of race and gender quotas for the federal bench. Some were fine appointments; some were clearly not. For example, President Carter persisted in the nomination of two affirmative action nominees who were overwhelmingly rated "not qualified" by the American Bar Association Standing Committee on Federal Judiciary.

The Reagan Administration has appointed considerable numbers of female and minority judges without resort to numerical quotas and without any compromising of the standards of qualifications and excellence which must be applied to all federal judgeships. This is as it should be. A policy of setting aside particular percentages of judgeships to be allocated on the basis of gender or race is incompatible with any responsible policy of judicial selection, not to mention the principle of nondiscriminatory merit selection.

President Reagan's appointment of Sandra Day O'Connor as the first woman on the Supreme Court exemplified not only the excellence of his choices, but the fair, non-discriminatory nature of his selection policies. In my view, the Reagan Administration deserves commendation, not condemnation, for its outstanding record of appointing highly-qualified judges of all genders and races who honor the principles of judicial restraint and are faithful to our great written Constitution.

Senator **Kennedy**. We want to welcome back to the committee Steve Markman and we look forward to his testimony. Mr. Markman had a distinguished career here as the chief counsel of one of our important subcommittees for a number of years. You know he served as the chief counsel to the current minority now. He was always responsive and forthcoming to any of the requests that any members of the committee had. We are glad to welcome him back to this committee.

I see Senator Hatch is here, and we are always glad to hear from Senator Hatch.

Senator **Hatch**. Thank you, Senator. I appreciate it.

Mr. Markman, we are happy to welcome you back to the Judiciary Committee. We appreciated your service up here very much, and I know you have a whale of a tough job down there. I have watched you strain with it and worry about it and so forth.

I appreciate Senator Kennedy giving me these few moments just to make a few points.

Over the past several months, this committee has had several opportunities to reflect on one of its most important tasks; that is, the confirmation of life-tenured Federal judges. With these experiences fresh in mind, I would like to commend the chairman for offering this further opportunity to examine the process by which Federal judges are chosen.

During the hearings associated with both Judge Bork and Judge Kennedy, many questions arose about the role of the American Bar Association. The questions pertaining to statements made in the press by members of the ABA screening panel were important. In addition to breaching the ABA's own standards of confidentiality, these statements also betrayed political and, it seems to me, ideological biases on the part of certain members of the panel who refused to be identified.

We are all aware of the importance attached to ABA assessments of judicial qualifications. Because ABA proceedings are wrapped in such an impenetrable cloak of secrecy, the only way to hold the ABA accountable, it seems to me, for the fairness and impartiality of their screenings may be through oversight hearings in this particular committee itself.

During the Kennedy hearings, I remember that Chairman Biden seemed willing to inquire further into the ABA's processes. The chairman is not here, but I would just like to ask that his staff note this: Has the chairman given further consideration to offering the ABA an opportunity to explain their process and to answer questions about the propriety of some of these recent investigations?

I think that is something that needs to be done. It needs to be cleared up.

As one Senator with a strong commitment to finding qualified Federal judges and to ensuring that the selection process is not encumbered with partisan or ideological considerations, I would express my hope that the committee could schedule a hearing to examine the ABA process. And I think it is well worth our time to do so. That is not a knock at the ABA because I think they do do, by and large, a very good job. I know that their intentions, by and large, are very noble and good.

But in connection with our own mutual goal that the judicial selection process operate free of inappropriate partisan influences, I want to particularly take this opportunity to commend Senator Biden for his willingness to keep the approval process for nominees working throughout this election season. The Federal judiciary is our Government's single non-political branch. To maintain the judiciary's independence and integrity, it is our responsibility to ensure that the judicial selection and confirmation process proceeds without undue political pressure or influence.

In that sense, Chairman Biden's message sends the correct signal that judges will not be treated as political footballs or exploited for partisan gain. I personally believe in that, and I hope that we will be able to continue to do that.

With that, Chairman Kennedy, I appreciate you giving me these few minutes, and I welcome Mr. Markman to the committee.

Senator KENNEDY. Mr. Markman, we will proceed. You have a very extensive statement, some 60 pages or so, which I have not had the opportunity to go through. I do not know how you want to proceed. There are about 15 or 18 pages of quoting cases in there.

How do you want to proceed? We want to obviously give you maximum flexibility. Do you intend to summarize it?

Mr. MARKMAN. If it would be okay with you, Senator.

Senator KENNEDY. We will put it all in the record.

Mr. MARKMAN. I will try to summarize it, if I could.

STATEMENT OF STEPHEN J. MARKMAN, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S DEPARTMENT OF JUSTICE

Mr. MARKMAN. Mr. Chairman and members of the committee, we have been invited to testify about aspects of this administration's judicial selection process. Let me try briefly to put that process into some context, if I might.

The debate generated by this administration's judicial selection process has served a valuable purpose in focusing public attention on the role of the courts in our system of limited, constitutional government. At the same time, sometimes exaggerated political rhetoric has led some to misunderstand this administration's judicial selection process. I believe that our paper works to try to dispel some of those problems.

President Reagan has a solemn constitutional obligation to "preserve, protect, and defend the Constitution of the United States." In that regard, one of the most important responsibilities of the President is the exercise of his appointment authority under Article II, Section 2, of the Constitution to determine the character of the Federal courts, a co-equal branch of the national Government. To ensure that the Constitution is preserved, protected, and defended, President Reagan is determined to appoint to the Federal courts only those individuals who are committed to the rule of law and to the enforcement of the Constitution and statutes as those were adopted by "we the people" and their elected representatives. President Reagan would be derelict of his constitutional duty if he were to appoint judges who were willing to create new constitutional "rights" out of thin air, usurp legislative and executive functions, or otherwise give short shrift to the will of "we the people" as expressed in the written law.

Judicial office is one of the highest of all public trusts. It demands and deserves the best talent our country has to offer. Consequently, the President seeks to appoint to the bench only those who have the intellectual capacity to deal with the difficult legal issues of a complex society, those who have the legal training and experience necessary to take on the important duties of the bench, and those who are of the highest personal integrity. He seeks to appoint individuals who are intensely committed to the American constitutional ideal of equal protection for all under the law. In order to find such individuals with the requisite professional and personal qualifications, the President seeks to consider the broadest possible range of individuals, regardless of race, gender, national origin, or religious affiliation.

In exercising his appointment power, the President also takes care that his nominees possess those important personal qualities that make for a proper judicial temperament. Those intangible qualities include a willingness to listen fully and fairly to all sides of an issue and never to pre-judge a case; an appreciation of the need to avoid even the appearance of judicial conflict of interest; a sense of compassion; a willingness to work hard to carry out the court's business without delay; and the demeanor necessary to treat every litigant and witness and counsel courteously and respectfully at all times. The President is determined that his appointees will carry out their duties with dignity, propriety, evenhandedness and professionalism. Many of these qualities are elusive and difficult to judge in an individual who has not already served in a judicial capacity. However, substantial effort is undertaken to identify these to the best of our abilities.

But for a President charged with preserving, protecting, and defending the Constitution, the search for judicial candidates with legal proficiency and judicial temperament, while critical and essential, is not the end of the process. It is also necessary that those to be appointed demonstrate a sound understanding of the proper role of judges under our Constitution, which by its own terms is the "supreme law of the land." Such individuals must demonstrate an understanding that Federal judges, no less than Members of the Congress, executive branch officials, and State and local legislators, are constrained to act always within the bounds set by the Constitution—that Federal judges, in President Franklin Roosevelt's words, are charged "to do justice under the Constitution, not over it."

Such an understanding does not require any particular view of public policy and has nothing to do with a judge's personal political predilections. It is one thing for a judge to think that some particular public policy is wise or foolish, prudent or imprudent. It is quite a different matter, however, for that judge to think it appropriate for him, rather than the people through their elected representatives, to sit in judgment on the wisdom of or necessity for that policy.

The classical conception of the judge's role in our system of Government was guided by a standard of fidelity to the Constitution as written. If a statute were challenged as unconstitutional, the judge's inquiry was limited to whether the statute in question exceeded a power granted in the Constitution or ran afoul of a prohibition contained in the Constitution. At the core of this vision was the belief that judicial power stemmed from the consent of the people, and could be used solely to effectuate the will of the people as authoritatively expressed in the Constitution ratified by the people. "We the people" were sovereign, and the judge's role was to act as the agent of the sovereign people in ensuring adherence to our highest law. What guided a judge in the exercise of the judicial power was a standard established in the four corners of the Constitution.

Self-government is the essence of the American experiment, but in recent years, observers of all political perspectives have rightly become concerned that the American capacity for self-government has been eroded as the Federal judiciary has increasingly asserted its control over matters that, under our constitutional scheme, are rightly the province of the coordinate branches of the national Government, States, local governments, and the private sector. The growth in the power of the courts has correspondingly reduced the power of the elected representatives of the people, and thus the ability of individuals to control their destiny by occasionally "throwing the rascals out of office."

There can be little doubt that some judges have increasingly substituted their own policy judgments for constitutional or statutory rules of decision in cases that have come before them. Through this kind of judicial overreaching—by which I mean a judge's assertion of and exercise of authority constitutionally reserved to other branches of Government—judges have involved themselves in American public policy beyond their constitutional warrant. Particularly where such authority is exercised in the name of the Constitution, these decisions have preempted the proper democratic decision-making process and withdrawn legitimate issues from debate within the popular legislative arena.

A recent example would be the action of a Federal judge in Kansas City, Missouri, who undertook to directly supervise the maintenance and report of the city's school system in Kansas City in the course of a ruling on a desegregation plan. Not satisfied with the State's proposals to fund improvements in the schools, the judge concluded that school buildings with "mismatched carpeting and tile" or "individual walls possessing different shades of paint" would not satisfy what he called "the visual attractiveness sought by the Court." The court's order provided for the construction of numerous new school buildings and included such matters as a 25-acre farm, a 25-acre wilderness area, numerous Olympic-sized swimming pools, and a model United Nations lab. To pay for these and other capital improvements, the judge evaluated the school board's request for "funding relief" and simply ordered the State to impose an income tax surcharge on all persons who reside or work within the school district. Despite the unwillingness of the residents of the district to approve tax increases to pay for the kinds of improvements approved by the court, the judge also ordered that the city property tax rate be almost doubled, stating his determination——

Senator **Kennedy**. Mr. Markman, if I could, with respect on this part, you have got about ten more cases. Are you going to go through these various cases?

Mr. **Markman**. No, sir. This is the only case I was going to go through.

Despite the unwillingness of the residents of the residents of the school district to approve tax increases to pay for the kinds of improvements approved by the court, the judge also ordered that the city property tax rate be doubled, stating his determination to "fund an operating budget which can provide quality education, including a high quality faculty." The judge here took it upon himself to order these expenditures and the tax increases to pay for them, including income taxes on persons not even residing within the school district, without having to consider the willingness of the city or State Government or the taxpayers to devote such substantial sums to the schools as opposed to other public projects and activities.

While all courts, Mr. Chairman, inevitably will be confronted with difficult controversies and fine lines where any decision may be subject to debate among reasonable men and women, we believe that resolving such controversies through resort to traditional methods of legal interpretation is the surest means to do justice while preserving the proper role of the judiciary.

The increasing exercise of policy-making authority by courts such as the one I just mentioned has led President Reagan, prior to his initial election, to promise that he would appoint individuals to the bench who understood the proper role of judges within our constitutional order. I describe our system in some detail in our paper.

One vignette from the previous administration's judicial selection process happily illustrates the sea change that has taken place in the judicial selection arena since 1981. I recall one confirmation hearing before this committee—Senator Kennedy, this was when you were the chairman of the committee—where a member of your panel asked the appeals court nominee before him, "If a decision in a particular case is required by case law or statute, and yet that offended your conscience, what might you do in that situation?"

The nominee answered, "I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience." The nominee went on to explain the standards with which he would replace the statutory law of the land by his conscience. And I quote again from the nominee. "I was born and raised in this country, Senator, and I am steeped in its traditions, its mores, its beliefs, and its philosophies; and if I felt strongly in a situation like that, I feel it would be the product of my very being and upbringing. I would follow my conscience, Senator." That nominee was subsequently confirmed.

To this administration's mind, for a Federal judge to render decisions according to his or her conscience rather than the law is itself unconscionable. Further, I surmise that this nominee was not as steeped in the "traditions, mores, beliefs, and philosophies of this country" as he believed. For, to quote once again from Chief Justice Marshall in *Marbury*, ". . . [i]t is emphatically the province and duty of the judicial department to say what the law is . . .

[t]he government of the United States has been termed a government of laws and not of men."

Senator, specifically in its efforts to identify candidates for appointments to the U.S. Court of Appeals for the District of Columbia Circuit, this administration has, like previous administrations, looked to able attorneys from across the Nation. This practice has recently come under some attack from different quarters, most notably the D.C. Bar. The D.C. Bar has questioned a number of President Reagan's nominees to the circuit over the past 7 years, including Judges Buckley, Williams and Sentelle. Representatives of the Bar have freely admitted that their concerns are not based upon the objective, qualifications of these nominees, but upon the fact that they were not selected from its own membership.

As Paul Friedman, then president of the D.C. Bar, stated during the confirmation hearings of one nominee, "These individuals, while in many cases extremely talented and able, nevertheless have been brought to Washington from elsewhere." As Mr. Friedman himself recognized, however, the practice of looking outside of the Washington legal community for nominees to the D.C. Circuit dates back to Franklin Roosevelt. We believe that the Bar's criticism, however well intentioned, is wholly unjustified and misdirected.

First, it must be understood that the Federal courts in D.C. are not local courts of the District of Columbia. Matters of local concern are under the jurisdiction of the specific Article I Federal courts of the District of Columbia. Since the District was granted home rule in 1974, cases of purely local concern, including the great majority of criminal cases, have been brought before the Superior Court of the District of Columbia with appeal to the Court of Appeals in the District of Columbia. Members of the D.C. Bar are traditionally selected to serve on those courts, the only truly local courts in the District.

The District of Columbia is the capital of the United States. As a result, the Article III Federal courts sitting in the District differ fundamentally from other Federal district and circuit courts. This is particularly true of the U.S. Court of Appeals for the District of Columbia. Like the Supreme Court itself, the D.C. Circuit is a national court. It should not be subjected to the parochial interests of the local bar any more than should the Supreme Court. In a very real sense, the local bar of the District of Columbia has no greater claim upon vacancies in the D.C. Circuit than does the local Bar of Wilmington, Boston, Cleveland, or any other city.

A review of the U.S. Code reveals approximately 200 separate Federal statutory grants of either exclusive or concurrent jurisdiction for the D.C. court, allowing it to hear cases from every corner of the Nation. Congressional enactments singling out the D.C. District Court for special grants of concurrent jurisdiction are also numerous in the code.

In addition to these specialized grants of concurrent jurisdiction, the venue provisions in the U.S. Code further broaden the number and type of cases that can be brought in the District of Columbia. It provides that a civil action against the United States, a Federal agency, or any office or employee thereof acting in his official capacity may be brought in any judicial district in which the defendant resides or the cause of action arose. Because the residence of the Federal Government and almost all of its various subordinate agencies is the District of Columbia, a suit against an agency or officer of the Federal Government may generally be brought in the U.S. District Court for the District of Columbia regardless of where the events in controversy took place.

In addition to its appellate jurisdiction over the D.C. District Court, various statutes vest in the D.C. Circuit Court exclusive appellate review of administrative matters, regardless of where in the Nation the controversy arose. In other words, the concentration of exclusive appellate jurisdiction over such matters means that the D.C. Circuit monitors extensive regulatory programs involving national environmental issues, safety issues and economic concerns. In most of these cases, the D.C. Circuit is the final arbiter of these national concerns.

These numerous grants of special jurisdiction to the Federal courts sitting in the District represent a recognition on the part of the Congress that they, and especially the D.C. Circuit, occupy a unique national position in the Federal court structure. These courts face national issues and render decisions with nationwide significance. In fact, to the extent that cases in the D.C. Federal courts have a uniquely local impact, that impact is felt most often not in the District of Columbia but in localities thousands of miles away: in the South as far as voting rights actions go; in the West as far as environmental actions; in Midwestern factories as far as occupational safety and health matters go.

Therefore, as a result of its unique jurisdiction and location in the capital, the D.C. Circuit hears a broad spectrum of cases involving issues that will substantially affect individuals and communities many hundreds and thousands of miles from Washington. The local members of the D.C. Bar have no greater claim upon it than they have over the U.S. Supreme Court, the Court of Appeals for the Federal Circuit, the Claims Court, or any of the other national courts headquartered in Washington. It is entirely appropriate that nominees to the D.C. Circuit should be drawn from the Nation as a whole and not merely the local Washington legal establishment. This administration's practice of considering candidates from across the country for judicial vacancies on the court, including but not limited to those from the District of Columbia, is thus consistent with the character of the D.C. Circuit, as well as with history and tradition.

Let me conclude my statement there, Senator. I go on in the statement to talk a great deal about the procedures that we employ, to talk further about the District of Columbia Courts, and to try to assess some of the results of this process, and to analyze the performance of our judges on the bench. I would be glad to go over any of those or any other issues related to the process that you would like to pursue.

Senator KENNEDY. Thank you very much, Mr. Markman.

I hope to complete all my questions in the 10 minutes, but we will try roughly a 10-minute rule because we have a number of our colleagues here.

It is clear from your statement and from your responses to the questions sent to you by the committee that the administration now believes that it is entirely inappropriate to make any special effort to find and nominate well-qualified women and minorities to the bench. Your responses will be placed in the record. In the 1980 presidential campaign, one of the candidates made the following pledge:

> Within the guidelines of excellence, appointments can carry enormous symbolic significance. This permits us to guide by example, to show how deep our commitment is, and to give meaning to what we profess. One way to live up to that commitment is to appoint a woman to the Supreme Court. I am announcing today that one of the first Supreme Court vacancies in my administration will be filled by the most qualified woman I can possibly find, one who meets the high standards I will demand for all court appointments. It is time for a woman to sit among the highest jurists.

That candidate, of course, was Ronald Reagan. In 1981, he made good on the first half of that pledge by appointing Sandra Day O'Connor to the Supreme Court. In that campaign speech, President Reagan recognized that the American people want the Federal judiciary to be an example of equal protection under law, and he also pledged, and I quote, "to seek out women to appoint to other Federal courts in an effort to bring about a better balance on the Federal bench."

And in his confirmation hearings, Attorney General Meese testified, and I quote, "I think it is very important that this administration, and certainly if I am confirmed as Attorney General, I will make the greatest search to try and find as many qualified people from all minority groups for presentation to the President for judgeships."

In light of the statistics displayed here, it is clear the administration has failed to make any real effort to find and nominate women and minorities to the Federal bench. My question is: Why not?

Mr. MARKMAN. Senator, this administration, first of all, is completely committed to the idea of equal opportunity in the judicial selection process. Second, there has never been one scintilla of evidence of discrimination toward women, minorities or anybody else in this process. Third, we have made significant efforts which I can detail to try to broaden the base of candidates. And, fourth, Senator, we remain open to this date to names and recommendations of candidates from anybody in this process, or anybody outside the process.

However, with all due respect, Senator—and I recognize our differences here—we do reject the idea of statistics and proportionality as a measure of equal opportunity. We are committed only to an open-door, a fair-shake, color-blind treatment, not equal results. We do not color code our judicial candidates as did, for example, the previous administration.

I would like to speak with you candidly in some more detail about the statistics and why the statistics are as they are, if you would give me just a couple more moments here.

Senator KENNEDY. Please.

Mr. MARKMAN. It is very easy, Senator, to distort the realities of this situation and to make political points. Let me try to speak with you very candidly.

We would love to find more qualified blacks in this process. This would broaden our base and this would——

Senator **Kennedy**. The statistic is five, I believe, five blacks for the district courts.

Mr. **Markman**. Yes, sir. That is correct.

Senator **Kennedy**. Is that correct?

Mr. **Markman**. Yes, sir.

Nothing would please us more to find more qualified black and minority candidates in this process. It is not easy, however. There simply is not the pool.

As Bob Raven, the former head of the ABA's judicial selection committee, said several years ago, "When you look at the universal pool, there really is not one for blacks or women or Hispanics."

You start off with the fact, Senator, that only three percent, just over three percent of all the attorneys in the United States are black. Next, consider that over half of those lawyers are in unsuitable age brackets to be considered for Federal judicial positions. Next, consider that a far smaller proportion of black attorneys are in this age bracket, an unusually large number, having only graduated from law school in the past 10 to 15 years.

You are now down to just over one percent of all the lawyers who are black and in the proper age bracket. But, of course, the real pool is even smaller than that when a fact of the life of the appointment process in all administrations was recognized; namely, that well over 90 percent of all judicial appointments for at least the past century have come from those of the same party as the President. This is true of Republican administrations and this is true of Democratic administrations.

It is a tragic political reality, perhaps both for the Republican Party and for the minority community, but more than 90 percent of the already minuscule pool of black lawyers that I have just described of suitable age have identified strongly with the other party from this President. Not that we do not look at Democrats in the same way that somebody like President Carter would look at Republicans. However, it remains the hard case that Senators who play a significant district court role are likely to recommend those of the same party. An administration's judicial philosophy is likely to be found disproportionately in members of the same party. And every other formal and informal element of the historic judicial selection process is likely to point in the direction of same-party appointments.

Finally, this nearly invisible natural pool is diminished still further by the fact that a disproportionate number of black lawyers operate in areas not normally viewed as traditional pre-judicial career positions. I am talking about Government positions and public interest law positions. In fact, you have only got 0.7 of one percent of all the partners in the largest law firms in this country are black today, and this remains the most fertile field for identifying judicial candidates.

None of this is to mention further that both the black and white pool is diminished still more substantially by this administration's acknowledged commitment to appointing only individuals who believe seriously in judicial restraint.

In summary, Senator, there is just not even a respectably small pool of black lawyers of suitable age, in suitable career positions, with any kind of Republican background, with some affinity for the

President's philosophy. It is to be hoped that this will change as more blacks are attracted to the law, as more lawyers gain experience and come of age, as more blacks are attracted to both political parties. I would expect this to happen over the natural course of things. But in a nutshell, this is the real world dilemma that we face. These professional and demographic and political realities should not be transformed into evidence of bad faith on anyone's part. That would not be an accurate assesment of the situation.

Senator KENNEDY. Well, you can talk about all of the color-blind tests, but the bottom line is that you end up with only white males as the ones that come out of that particular process which you have just mentioned. We will have later opportunity in terms of the consultation process, which we will get into. Hopefully, I will be able to get into that myself. But I want to move on.

As the charts indicate, there has been a steady increase in the numbers of women and minority lawyers. It should, therefore, be getting easier to find qualified nominees. But in 1987, the administration's record grew even worse than it had been in 1981 through 1986. Women nominees fell from 9.2 percent in 1981 to 1986, to 5.4 in 1987. Black nominees fell to 1.4 percent of the total, from 1.7 previously, and Hispanics dropped from 4.4 to 1.4. So out of more and more women and minorities, the administration is choosing less and less, even though the numbers of total women and blacks and Hispanics have been going up.

It makes it clear the problem is not that it is difficult to find qualified women and minorities; the administration is making no real effort to look for them. At your own confirmation hearings, Mr. Markman, you pledged to "consult on a regular basis outside organizations such as the National Bar Association." In your answers to our letter, you indicate that the administration maintained an open door to such organizations. You invited them to recommend qualified candidates. You stated that on some occasion you have contacted organizations yourself.

We will hear the representatives from a number of these organizations testify. I do not know whether you want to describe in greater detail what contacts you have had with the National Bar and the various women's bar associations.

Mr. MARKMAN. Well, Senator, at one time or another, and on more than one occasion in most instances, I have spoken with members of the National Bar.

Senator KENNEDY. More than one occasion? Did I understand that?

Mr. MARKMAN. Yes, sir. I have spoken with members of the National Bar. I have spoken with the Federation of Women Lawyers. I have spoken with the NAACP. I have spoken with the NAACP Legal Defense Fund. I have spoken with other organizations that represent minority lawyers and other organizations that generally have minority memberships. And I have indicated to them that we welcome their input, we welcome their recommendations, we welcomed any names they had for any vacancies anywhere in the district and circuit courts across the country.

That is keeping an open door, and I have done my best to do that. We have engaged in outreach efforts. We have engaged in efforts to try to identify individuals who might not normally come to our attention in the normal course of things. But as I tried to share with you a moment ago, it is very difficult. There is just not the pool that exists today.

I hope that will change over the course of time, but it is exceedingly difficult.

Senator KENNEDY. Let me ask you, has there been any specific instance in which the President has nominated a person that has been recommended by any of these groups? I am not asking for their names. We can do that on a confidential basis. But has there been?

Mr. MARKMAN. To the best of my recall, I do not believe that we have nominated any individuals whose names have first come to our attention through those organizations. That would be correct.

Senator KENNEDY. Without getting into names again, has the administration ever withdrawn any nominee because of the information that was provided by any of these groups?

Mr. MARKMAN. Again, my recall, Senator, is that we have not withdrawn any individuals on the basis of information provided by those groups. But let me——

Senator KENNEDY. Or not made a nomination? I mean maybe it has not gotten in. Not made a nomination?

Mr. MARKMAN. It may well be the case. Obviously, as you know, any administration often withdraws candidates on the basis of adverse information that comes to its attention through the American Bar Association and the FBI background processes. The FBI always speaks with representatives of the minority community. So it might well be the case that their input did have an impact in the context of individual withdrawals of nominations.

Senator KENNEDY. My time is running out here.

In the District of Columbia, which has no senators, the administration's record is particularly poor. Of the 14 nominations to the Federal court made to date, all 14 have gone to white males, in spite of the fact there are 10,000 women lawyers, 3,000 black or Hispanic lawyers in Washington, many dealing with many of the kinds of specialized areas which you have identified, which are so significant and important.

We have heard your testimony about the national search, but the fact that the administration makes a national search for nominees to the Federal court here just makes the fact that you have nominated 14 white males that much more difficult to explain. There are over 85,000 women lawyers in America, 20,000 black lawyers, 15,000 Hispanic lawyers in the country. If the Federal courts here are to be national courts, do you not think it is important that women and minorities, who often need the courts to protect their rights, know that the Federal courts are not just reserved for white males?

Mr. MARKMAN. Senator, I think you have got to be very careful with those statistics. I do not question the raw numbers that you gave, but I think you do have to recognize that as far as each one of those discrete groups—blacks, women and Hispanics—a grossly disproportionate share of those individuals have only gotten out of law school in the past 10 to 15 years.

And as Mr. Martinez of the Hispanic Bar said recently, "Most Hispanic attorneys in the United States are first generation attorneys." They simply do not have the professional experience and the background now such as to put them within the normal pool of individuals who are considered seriously for judicial positions.

So when you're talking about women, for example, Senator, I think if you take into account the percentage of women attorneys, the age bracket they are in, the kind of career they are in, the pool drops substantially. You are talking about a very small percentage.

Senator KENNEDY. You are talking about 14 nominations by the administration, and not one woman. Not one woman. Fourteen nominations and not one woman in one of the most important courts of this country. I find it difficult to accept that as an explanation.

Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I might add that President Reagan appointed the first woman Supreme Court justice, as you have pointed out. He can hardly be faulted with the failure to elevate qualified women because he has appointed 28 other women to Article III courts.

As such, it needs to be pointed out that President Reagan has appointed more women and minorities than did Ford, Nixon, or Johnson. Only the Carter administration appointed more, and I think that is to their credit. I certainly agree with that.

I also agree that if you're talking about standards, because women have recently come into a high percentage of law students compared to before, I think that you cannot have a 12-year standard and expect to have women appointed to the court. So I think that perhaps that standard can be lowered somewhat in order to try and find women, qualified women who can be on the courts.

But, you know, I do not think the Reagan administration needs to be bullied or pilloried because of what they have tried to do, and I know the efforts that you have made to try to find qualified women, blacks, Hispanics, and other minorities.

Let me just bring up a subject that I think is equally important. That is, recently I read a New York Times article, dated January 14, 1988, that causes me some genuine concern. It seems that Vaughn Walker, a partner in the law firm of Pillsbury, Madison and Sutro in San Francisco, and a prospective nominee is meeting some opposition from some special interest. The character of that type of opposition, after having gone through Bork, causes me a great deal of concern.

I thought that opposing a nominee because of his membership in the Masons was stretching a little bit, but this goes even further than that.

Apparently, Mr. Walker represented the Olympic Committee in its suit to bar a gay organization from using the term "Olympics" in connection with their homosexual groups. He also represented the National Rifle Association, the NRA. And on the basis of his representation of certain clients, he is opposed by some of these groups.

Now, what are your impressions of judging attorneys on the basis of their clientele? Would not this discourage attorneys from representing unpopular clients?

And I might just point out in that regard, Sporkin when he came up here was opposed by some conservatives. I helped to knock that opposition down and to get him through.

Dwyer from Seattle was opposed by a number of people here on the committee at one point, and I helped to knock that down even though Dwyer's philosophy is probably totally the opposite of mine. He was a qualified, very intelligent, ethical and good lawyer who had represented some unpopular clients. Sporkin had represented a very unpopular client in the eyes of the business community—the Securities and Exchange Commission among other things.

Now, I would like you to answer that question.

Mr. MARKMAN. Could I just make one quick response to your earlier comment, Senator, about our women appointments?

Senator HATCH. Sure.

Mr. MARKMAN. Just so that nobody walks away from this hearing without putting this in the proper perspective. This administration has appointed more women and more Hispanics and a higher percentage of women and a higher percentage of Hispanics——

Senator THURMOND. Speak into your microphone a little louder so we can all hear you.

Mr. MARKMAN. Yes, sir. This administration has appointed more women and more Hispanics and a higher proportion of women and Hispanics than any administration in the history of the country with the exception of the immediate predecessor administration. We do not do it because we look for women or Hispanics or because we have any particular numerical goal, but I do think that that perspective needs to be there.

Senator HATCH. And I pointed that out.

Mr. MARKMAN. We have a very different philosophy——

Senator HATCH. Is there also a commitment to do even better?

Mr. MARKMAN. We certainly want to continue to keep that door open as wide as possible and identify additional qualified minorities and women. Absolutely.

We do have some disagreements—again, respectful disagreements—with the philosophy of the previous administration, and I quote President Carter. "If I did not have to seek Senate confirmation of my nominees, I could just tell you we would have 40 percent women and 12 percent blacks and 3 percent Hispanics." I understand the thought behind that, but there is a very different kind of understanding of affirmative action in this administration than in our predecessor.

On Mr. Walker, it is interesting that you raise that, Senator. Vaughn Walker is a very distinguished attorney in San Francisco. This is one of the most egregious episodes of opposition to any of the nominees of this administration that I can think of. As you indicate, Mr. Walker seems to be opposed simply because of the fact that he has represented clients that in some quarters are unpopular clients, particularly the International Olympic Committee in a trademark infringement suit against the Gay Olympics in San Francisco. This is guilt by professional association. I just find it ironic that an interest group in San Francisco that itself might be unpopular in some other areas of the country has taken upon itself the idea of opposing a candidate because he represents groups that they consider to be unpopular, such as the International Olympic Committee.

He is a very distinguished attorney, and I think we would be in sorry straits if we got to the point that a candidate had to consult an interest group in order to determine whether or not some client that he was planning to work for was on their approved list. I find that a remarkable basis——

Senator **Hatch**. By the way, both Sporkin and Dwyer were nominees of this administration.

Mr. **Markman**. Yes, sir. That is correct.

Senator **Hatch**. There were conservatives who were very upset about Sporkin and Dwyer.

Mr. **Markman**. Yes, sir. That is correct.

Senator **Thurmond**. I might add that Dwyer testified and admitted himself that he had voted against Reagan and had even contributed against him, but yet the Reagan administration appointed him.

Mr. **Markman**. Yes, sir.

Senator **Hatch**. He told me personally he would have voted against me. But I supported him.

Senator **Leahy**. I wish I had known that before we voted on him, Orrin. He never would have gotten through this committee.

Senator **Hatch**. I did not tell you that because I know about your righteous indignation.

The fact of the matter is that it makes the point that you just cannot judge attorneys based upon the clientele that they represent. My gosh, we want to encourage attorneys to represent unpopular clients and to what they should do with the law. Just like doctors have to be encouraged to help unpopular patients, too, in this day and age. We cannot play those kind of games.

Mr. Chairman, I think I have about three or four more minutes. But Senator Grassley has to go. Could I give those to him? I would be appreciative if you would let him take the bell.

Senator **Kennedy**. Senator Grassley.

Senator **Grassley**. Thank you, Mr. Chairman. Thank you, Senator Hatch.

In your prepared statement, Mr. Markman, you mentioned the truly local courts of the District of Columbia, like the D.C. Superior Court and the D.C. Court of Appeals. How are judges for these courts selected? And specifically, what role does DOJ play in the selection process?

Mr. **Markman**. The Justice Department does not play an essential role in that process, Senator. Recommendations, I believe, come from a D.C. nominating commission and go directly to the White House. The White House is the key player in that process.

Senator **Grassley**. What is the makeup of these courts? Is each member selected from the local Bar?

Mr. **Markman**. I believe the Bar puts together lists of individuals, most of whom I believe do have some roots in the local Bar. Then, again, the ultimate selection would be made by the President and the White House.

Senator **Grassley**. Since the White House and the President makes those selections, how many women serve on these courts?

Mr. Markman. Well, the best information I have is that this administration has appointed 26 individuals to those courts. I believe seven of those have been blacks; one has been Hispanic; five have been women. So I think you are talking about half of the appointments to that court being in the minority groups that we have been speaking about today.

Senator Grassley. Mr. Chairman, since I have to go, I have questions of this witness as well as the two other panels. Could I submit those in writing?

Senator Kennedy. They will be submitted to the various witnesses and made a part of the record.

Senator Grassley. Thank you, Mr. Chairman.

Senator Kennedy. Senator Leahy.

Senator Leahy. Thank you, Mr. Chairman.

I found this interesting. Mr. Markman says that this administration has appointed more minorities than any but the previous administration. Does that mean the previous administration appointed more in their 4 years in office than this administration has in its 7 years in office? Is that what you meant?

Do you mean actual numbers?

Mr. Markman. I believe I was speaking both about numbers and proportions.

Senator Leahy. So they in 4 years appointed more—and you are now in your 8th year—than you have? Is that correct?

Mr. Markman. I believe that is so.

Senator Leahy. As the charts that the chairman has put up there show, you had a far greater number of women lawyers and black and Hispanic lawyers to choose from than the previous administration. Is that correct?

Mr. Markman. There certainly were more women and minorities.

Senator Leahy. So the indication, of course, being that not only did they surpass you in numbers, but greatly in proportion as well. It becomes a qualitative as well as quantitative measure.

I also find interesting the administration's argument that it selects nominees purely on the basis of merit. Well, now, I am one person that can say he has read virtually every backgrounder on every judicial nominee, and that is pure hogwash. You have had some very good people here, and you have had some people who have shown distinguished mediocrity. Do not say they are picked only on merit.

Now, you say also you maintain an open door toward minority Bar groups for suggestions, and I believe you mentioned one you had met with once. How many times have you met with, for example, the D.C. Bar looking for possible judicial nominees?

Mr. Markman. I have spoken to Mr. Friedman on the phone several times. I have met him and several of his colleagues in my office on one occasion.

Senator Leahy. One occasion?

Mr. Markman. Senator, I have indicated to him that we wanted to maintain a continuing relationship, which I think we have. And we have indicated to him we would like him to always feel free to pass names on to us of individuals that he felt we ought to consider seriously for appointment.

Indeed, he has passed on those names, and I think I can say there has been—I think from their own perspective they would acknowledge there has been some success in that relationship.

Senator LEAHY. I am just trying to remember, for example, the D.C. Court of Appeals. Here's a bar with the largest percentage of blacks, and the largest percentage of women, of any bar in the country. How many women or blacks have you appointed to the D.C. Court of Appeals?

Mr. MARKMAN. I think Senator Kennedy was correct when he said that we had not appointed any.

Senator LEAHY. I just want to make sure I did not miss something.

Now, we had asked the Attorney General to testify here. He was unable to arrange to be here but feels that you, of course, can speak for the Justice Department. When he did testify 4 years ago as the nominee for Attorney General, he was asked about the issue of diversity on the Federal bench.

Let me just go through a couple of points he made. First, when Senator Kennedy asked him whether he was comfortable with the percentage of minorities appointed to the Federal bench, he replied, "I do not think, Senator, I would ever be comfortable with percentages until we had reached the point where the percentage of minority judges is at least somewhat representative of the number of lawyers involved as a percentage of the total legal profession who might be candidates for those jobs."

He then testified, "I think that we ought to look at trying to get as many qualified minorities as possible, but obviously, there has to be some statistical correlation between the pool you are drawing from and the number you are appointing." He said something similar in the 1985 confirmation hearings: "We are not satisfied until we have a reasonable representation of all minority groups on the Federal bench."

Now, in your testimony, you say that race and gender are irrelevancies. Which is it? Are they irrelevancies, or was Attorney General Meese telling the truth in what he said before this committee in 1984 and 1985?

Mr. MARKMAN. Well, I think I am always cautious about putting words in anybody else's mouth, Senator. But I believe that what Attorney General Meese was saying and what, indeed, he has said on many occasions——

Senator LEAHY. Pull the mike a little closer.

Mr. MARKMAN. Indeed, what he has said on many occasions is that in the natural course of things, as minorities become better represented in the legal profession, as they gain experience and training and are thus put in a position to be considered seriously among the pool of judicial appointees, they will become reflected in greater proportions in the bench. That is part of the natural order of things that I would expect to see.

Senator LEAHY. Well, let me ask you about that. He said that the pool of qualified candidates includes only those lawyers with at least 10 to 12 years of experience. Then he said, "Ten or 12 years ago, there were not that many women in the law schools and not that many minorities in law schools." That is a situation that has improved considerably during the past decade.

Now, we are 4 years later. Remember he also said at that time, "This situation itself will ease in the future." There are a lot more minorities and women in the pool, but in 1984, 7 percent of the Reagan nominees were minorities. Now that we have increased that pool by 4 years, the figure is down to 6 percent. If you look at the nominations made in 1987, three out of 79 are minorities and that is down to 4 percent.

Is that situation easing? I mean are you satisfied with that? Is the Attorney General satisfied with that? How do you square that with the earlier testimony?

Mr. MARKMAN. I am not sure what I need to square. Senator, again——

Senator LEAHY. Well, I would like you to.

Mr. MARKMAN. If you go back to the point I was trying to make—and I do think it is a very, very important one if we want to look seriously at why there are not more blacks on the Federal bench. Believe me, we all share the same objective of some day seeing that there are more of every group represented on the bench to the extent that merit would suggest. But you have got about 1 percent of the total Bar in this country is black; about 1 percent of the total Bar in this country is Hispanic that is within the proper age bracket to be seriously considered for a Federal judicial position.

Again, this fails to take into account, totally fails to take into account the fact that a disproportionate number of those individuals are in career positions that are not traditional career positions for judicial selection. And you also fail to take into account the fact of life—and you can lament it; we can be sorry about it—but the fact of life that every President—Carter and Johnson and Kennedy and Ford and Eisenhower—has appointed well over 90 percent of their judicial appointments from among the same party. That reduces the pool a great deal when we are talking about Republican administrations. Not just this Republican administration, Senator, but any Republican administration.

It is a tragedy in many respects, but it is a fact of life. And I would not confuse that tragic situation——

Senator LEAHY. Does that mean that——

Mr. MARKMAN [continuing]. With bad faith on anybody's part.

Senator LEAHY. Does that mean a race is excluded from significant participation in a governmental process because of their political background when they have been excluded for every other reason you could think of in the past? What reason can we think of next, if they switch parties?

Mr. MARKMAN. No. It does not mean they are excluded, Senator, any more than an entire party is excluded. But it does make it less likely, again in the normal course of things, that an administration will be able to select individuals who are partisans of the other party.

Senator LEAHY. What about women? Do you say that same thing there?

Mr. MARKMAN. Again, I think our record on women is one that we can take some pride in. The fact is we have appointed a total of 29 women. This is more than any administration except for the immediate predecessor. It is a higher proportion of appointees than any except the immediate predecessor.

Senator LEAHY. You have also had 3 years more to do it and with a far greater pool to pick from. So you are really not saying much when you say that it has been more than anyone but your immediate predecessors. There has been a steady increase in women coming into the Bar. As President Carter had more women to pick from who were members of the Bar than his predecessor did, and his predecessor has more than the one before. Your administration has had not only more women to pick from but more time to do it. So it really is not a badge of honor to say you come in second in this.

Mr. MARKMAN. Senator, I hate to play these statistical games, but I think it——

Senator LEAHY. That is what we have got to go with.

Mr. MARKMAN. It is particularly unfair to do that when you are talking about an immediate predecessor administration, as I indicated earlier, that in all sincerity and good faith brought a philosophy to their judicial selection process that we have not chosen to accept.

Senator LEAHY. Well, now, that is not so. That is not so. You cannot have it both ways. When the Attorney General came up here in 1984, he testified, "This administration has been very aggressive in attempting to work with the senators to find qualified minorities and qualified women. I would certainly, if confirmed, want to continue to that practice and do my utmost to continue to find those people."

Nice words when you are seeking confirmation. Talk about a confirmation conversion. Here is your testimony. "If any one or all of the individuals a senator recommends happens to be women or racial minorities, it is irrelevant to our selection process." Are we doing confirmation conversions in reverse now?

Mr. MARKMAN. No, Senator. We——

Senator LEAHY. Mr. Markman, I have a great deal of respect for you and your abilities, but you cannot have it both ways——

Senator THURMOND. Mr. Chairman, I suggest he be allowed to answer the question.

Senator LEAHY. You cannot have it both ways.

Senator THURMOND. He has got a right to answer the question.

Senator KENNEDY. He will answer it.

Mr. MARKMAN. Senator, we would disagree with the perspective articulated by the Attorney General under the previous administration, and I quote him: "That Mr. Carter was prepared to appoint to the Federal bench a black, Hispanic or woman lawyer who was found to be less qualified than a white male so long as the appointee was found qualified." That is not part of the premise that we bring to our day-to-day activity.

On the other hand, we try to bring the net, sweep the net in as broad a way as we possibly can. How do we do that? We do that by talking with members of Congress who are in a position, as you know, to be very active in the district court selection process. We make it clear to them that we are looking for minorities and women. In the course of our discussions with bar leaders and the course of our discussions with political officials and governmental officials, we make that clear.

I am not sure what we can do beyond that. We try to drag the net in as broad a way as we possibly can. When we learn of a woman who seems to be somebody that we would want to seriously consider, or a black or Hispanic, I can tell you we invite them in with alacrity. We try to learn everything we can about them. We do everything we can to make sure that nobody slips through the cracks in this process.

I think, though, that it is going to take several additional years, though, before the factors that I indicated earlier come to fruition before you can reasonably expect that there is going to be a great deal more women and blacks and Hispanics sitting on the Federal bench, unless you have a President who has adopted the kind of premises that President Carter brought to office and that we reject on many, many grounds.

Senator LEAHY. Mr. Chairman, my time is up, and I apologize for going over. I would ask unanimous consent that my statement be placed in the record.

Senator KENNEDY. Your statement will be made a part of the record.

Senator LEAHY. I would also note that it is unfortunate that the Attorney General is unable to testify here. Because, Mr. Markman, with all due respect, your testimony is at odds with what the Attorney General told us when he was seeking our votes for confirmation.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF SENATOR PATRICK J. LEAHY
SENATE JUDICIARY COMMITTEE
OVERSIGHT HEARING ON JUDICIAL SELECTION
FEBRUARY 2, 1988

This morning's hearing poses an important question for the future of our federal courts and of our system of equal justice under law.

The statistics and charts we will review this morning prove a simple and alarming fact: throughout the Reagan Administration, the opportunity to serve as a federal judge has been almost totally restricted to lawyers of one race and one gender.

This fact means disappointment for lawyers who are women or members of minority groups. It dims their prospects for advancement and recognition in their chosen profession, and limits their opportunities to contribute fully to our legal system.

But this trend toward an all-white, all-male federal bench is not simply unfair to excluded groups. It is unfair to every American --lawyer, litigant, and ordinary citizen -- who believes in the ideal of equal justice under law. It irrationally deprives the nation as a whole of the benefits of a court system that fully reflects that ideal. It looks backward, rather than forward to a future of greater opportunity for an increasingly diverse America. And, most dnagerously, this trend threatens to undermine public respect for the federal courts, and to reinforce cynicism about our aspirations for equal opportunity for all Americans.

In this last year of the Reagan Administration, much has been said about the Reagan legacy. The make-up of the federal courts may be this President's most enduring legacy. He has already made more than 340 lifetime appointments to the federal courts. Before next January, that figure may rise to nearly 400: more than half of the entire federal judicial system.

The record after seven years of Reagan appointments is alarming. Over 91 per cent of the appointments have gone to men. Barely six per cent of the new federal judges are members of minority groups. Only five black lawyers have become federal judges in the past seven years.

Most distressingly, the record seems to be getting worse, not better. Of the 79 federal court nominations received by the Judiciary Committee last year, only four nominees are women. Only three are members of minority groups; only one of these is black.

The Reagan legacy of a federal bench largely closed to minorities and women was an avoidable disappointment. Over the last few decades, the legal profession as a whole has benefitted from an influx of talented members of previously excluded groups. This trend has accelerated during the 1980's. But as the bar has become more diverse, more reflective of American society as a whole, the federal bench has become less diverse.

History gave this President a great opportunity to advance the ideal of equal justice through his power to nominate hundreds of federal judges. That opportunity has been wasted. We will be paying the price of that lost opportunity for years to come.

It did not have to be that way. This Administration **could** have reached out to nominate more minorities and women -- skilled, experienced, talented men and women who would make outstanding federal judges. The result would have been a federal bench no less excellent than the federal bench that makes up the Reagan legacy. But this Administration chose the easy way out. It chose as the Reagan legacy, as our nation enters its third century, a federal court system that many Americans perceive as unprepared to provide equal justice to an increasingly diverse American population.

This morning's hearing will examine that choice. We will scrutinize a judicial selection process that claims to be looking for excellence, but that somehow almost always finds it only among lawyers of one race and one gender. We will discuss steps this Administration could take, in its final year in office, to regain lost ground and salvage at least some of the opportunity it has squandered over the past seven years. And we will, I hope, make a record that will help the next President to learn from the errors of this one, and to overcome the Reagan legacy: a federal bench chosen by yesterday's standards to meet tomorrow's challenges.

Senator **Kennedy**. The Senator from South Carolina.

Senator **Thurmond**. Thank you, Mr. Chairman.

Mr. Markman, as you know, we have 27 judicial nominations pending before the committee at this time. Some of these have been here for as long as 1 year. I want to publicly commend the statement of the chairman, the distinguished chairman, Senator Biden, for saying and agreeing that all nominees will be given a vote, up or down. I think Senator Biden is entitled to that credit.

Now, Mr. Markman, it is my understanding that there are approximately 30 vacancies remaining within the Federal judiciary for which no nomination has been made. Would you please tell me about how many additional nominations will be made to the Federal courts this year? And do you plan on sending them up right away?

Do you plan to fill these vacancies? And if so, how soon do you think you can send up the nominations?

Mr. **Markman**. Yes, sir.

Senator **Thurmond**. Additionally, has this process taken longer than usual? Why do we have this many vacancies?

Mr. **Markman**. This is an area, Senator, that has been given some attention in the press lately. Again, I respect and understand the differences of opinion that Senator Leahy, in particular, has expressed with those of the administration. This administration has never attributed bad motives to the process. We have never questioned the objectives that the committee is following in the process. But we do have an honest disagreement over the length of time that the process is taking.

The average district and circuit court process over the course of the past six presidencies has been between 17 and 30 days. The time period between nomination and confirmation for our district court nominees has tripled from the 100th Congress over the 99th Congress, and it has quadrupled in the case of circuit court nominees over that period of time.

Again, we do not gainsay the need for thorough evaluation and investigation of these nominees. We do not begrudge the committee whatever efforts it wants to undertake in looking and scrutinizing our candidates carefully. But in all frankness, we do see some balance necessary in the process, and we think we may have seen that balance go a bit awry during the course of the last year.

Senator **Thurmond**. Are you planning to send up nominations to fill these vacancies soon?

Mr. **Markman**. Yes, sir. We would expect to send up nominations until next January 20th.

Senator **Thurmond**. Mr. Markman, there has been concern expressed by some members of this committee over nominees that receive a split rating of qualified/not qualified from the ABA. Should we be concerned about a nominee that receives such a rating? Sometimes it may be that if you have a committee, say, of 10, nine may favor qualified, and you may have one favor not qualified. Yet it goes to the public as a split rating, and the public does not understand it.

Do you have any comment on that?

Mr. **Markman**. Yes, sir. I think there has been an unusual amount of attention given to the candidates that we have nominated who have received that rating. In other words, a majority qualified and a minority not qualified. What that could mean, Senator, is that you might have 13 members of the ABA committee finding an individual qualified and one not qualified, and all of a sudden you have got a split rating.

Most of our split ratings have come in the context of some of our younger candidates. There are some members of the committee who feel that there is some arbitrary age bracket beyond those of some of our candidates. Or it has come with our academic appointments. There is a feeling on the part of some members of the committee that an academic background is not well suited to a judicial position.

But this is certainly not the first administration that has had nominees who, on occasion, were found not qualified by a minority. In fact, our percentage is just about where the Carter administration was. More than anything, this is a function of leadership.

Just like on the Supreme Court. There are some chief justices who place a great deal of importance, for example, on the idea of unanimity and getting everybody together and seeing that there is a nine to nothing vote. You have got other justices who do not find that quite as important. I think you see the same thing on the committee.

Sometimes the leadership will work hard to eliminate any kind of dissent. Other styles of leadership do not place a very high premium on that.

The fact is, we have got almost as many candidates who have been found qualified by a majority of the Bar with a minority finding them well qualified as we do of candidates who have been found not qualified by a minority of the Bar.

Also in that regard, Senator, I would note that this is the first administration, with the exception of President Ford's administration, that has not had any of its judges appointed who have been found not qualified by the American Bar Association. You go back to President Eisenhower. Eight of his nominees were found not qualified. Under President Carter, three of them were found not qualified. This administration has no judges that have been confirmed that are sitting on the bench that were found not qualified.

Senator THURMOND. Some people raise the question, too, about experience. I have often wondered if it is not the number of cases they have tried rather than the years of experience. I know some lawyers that have gained more experience in 5 years than others have gained in 15, maybe, because they have tried a lot more cases.

I wonder if you would have any comment on that.

Mr. MARKMAN. Well, again, I think this is one of the matters that somebody would look to in order to determine the quality of nominees. There are only so many objective indicia that exist to determine the quality of candidates, and we can go back and forth and say, yes, this candidate is good and you can say, no, that candidate is not good. But I think if you look at what objective indicators exist, this administration stacks up very well with its predecessors.

If you look at the American Bar Association ratings, we do excellent. And if you look at the nature of their experience, we also do quite well. In fact, through the end of the 99th Congress, 77 percent of President Reagan's appointees had prior experience as a judge or a prosecutor, the highest percentage of any administration going back to President Johnson.

Senator THURMOND. Mr. Chairman, I will not take any more time. I may submit a few questions that he could answer for the record. I have another appointment if you will excuse me now.

Senator KENNEDY. Fine.

Just a couple of final observations. You know, I will submit the exact numbers, but I believe I am correct. In the 1960's, 1962, we had about 200,000, 230,000 lawyers in the country. Now we are up to about 800,000. You are talking about 85,000 on that. You can look at it your way and talk about the percent that you considered to reach the number of blacks or women that are going to be qualified for the pool which you are going to select. Then you define what is going to be in that pool. But you just really cannot get away from the explosion in the number of both blacks, women and other minorities to choose from.

What we have seen, we will hear later, is that you have a number of governors—Republican governors as well as Democrats—that are selecting women and minorities who are serving with distinction in various State courts. We will hear more on that.

Let me just, on a final point, ask you about this. We have a recent vacancy now in the D.C. Circuit. This provides, obviously, an opportunity for the administration to end what I call its 0-to-14 streak on women and minority appointments. Can you tell us now, to the extent that you can, what the progress is in the selection for that vacancy, and whether you are reaching out to the various groups and trying for this vacancy to take into consideration their views and their nominations and suggestions?

Mr. MARKMAN. We are obviously not starting here with a blank slate, Senator. We have gotten a great many names that are under consideration. We have put together short lists and long lists. I think I can tell you that on those lists, including the short list, are candidates who both come from the District of Columbia and who come from outside the District of Columbia. We also have candidates on that list who are women and candidates who are blacks. Not, again, because we feel under any compunction or obligation to put so many blacks or women on that list, but because we feel that there are several who do have the qualifications to serve with distinction in replacing a very great appellate court judge, Judge Bork.

We are in the process of winnowing those lists, and I hope that we are going to be making a decision in the very near future. But I can tell you that we are looking very seriously at a number of very qualified minorities, as well as qualified non-minorities.

Senator KENNEDY. Have you contacted the various groups here, either the local Bar groups or the other associations, to get their recommendations or suggestions with regards to this vacancy? The National Bar Association and the Federation of Women Lawyers?

Mr. MARKMAN. Well, we have not specifically consulted those two organizations. No, sir.

Senator KENNEDY. All right.

Senator **Leahy**. I have just one question, and that is the obvious one. Why have you not? Why have you not consulted with them if you are, indeed, casting a net out here?

Mr. **Markman**. Well, first of all, Senator, we have consulted with them in the past, and we have told them if you have any names, please share them with us.

Secondly, let me say that I am not persuaded, particularly in the case of the Federation of Women Lawyers, that this is an organization that necessarily represents a cross-section of women in the bar. This is an organization that has opposed the Bork nomination; they have opposed many of our lower court nominations. I believe they opposed the Rehnquist nomination, although I could be wrong about that.

I think it is natural, again, in the course of things, that an administration is going to want to consult an organization that has some affinity with its objectives. I cannot imagine that the Johnson administration would have wanted to establish a close consulting relationship with organizations that opposed Thurgood Marshall for the Supreme Court.

That is not to say that we do not keep an open door. That is not to say that we do not fervently hope that we will get names over the transom or elsewise from that organization that we may be able to go with in the process. But I do not believe that this is necessarily an organization that represents a cross-section of women lawyers.

Senator **Leahy**. Do not be too hasty on that. You know, a lot of us—I speak from personal experience, when I make an appointment in my office, or I am recommending someone for appointment. When I go back in my own State and I go, among others, to the senior members of the Republican Party in Vermont. I found some of the suggestions have been very good there. Do not turn a blind eye. You may find that by casting that net out there we may actually end up with a court that might start to reflect at least a little bit the makeup of the bar that is going to be handling most of the cases before that court.

Thank you, Mr. Chairman.

Mr. **Markman**. Senator, I can assure you we consult with many organizations that are less than receptive to the judicial philosophy that President Reagan has brought to bear in his appointment process. We will continue to do that.

I think the question here is whether or not there might not also be other organizations that ought to be brought into the process.

Senator **Leahy**. Understand, Mr. Markman, that I have no concern with the fact that the Reagan administration, having campaigned in two elections saying that they want to appoint conservative Republicans to the bench, or words to the effect, has a right to go out and look for them. And if they are qualified, fine. As you know, I, just like everybody else up here, have voted for 98, 99 percent, whatever it is, of the nominees. But when the President has the opportunity to appoint more judges than any person in history, judges that go way beyond his term in office, lifetime appointments, I think there is a certain responsibility, not only to the country but to history, to try to bring more than one particular part of the bar on to the bench.

I think that if you did so, you would hold out goals of excellence to all the bar. I do not think that has been done. I think it is a historic opportunity lost. That is all.

Senator **KENNEDY**. Okay. We are glad to have you back. You might not have felt that way, but we are glad to have you back. You did a good job in defending an indefensible position. [Laughter.]

But we appreciate the chance to see you again. Thank you very much. We are delighted to have you.

Mr. **MARKMAN**. Thank you, Senator.

[The prepared statement of Mr. Markman and response to questions follow:]

STATEMENT

OF

STEPHEN J. MARKMAN
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL POLICY

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

THE JUDICIAL SELECTION PROCESS IN THE REAGAN ADMINISTRATION

FEBRUARY 2, 1988

Mr. Chairman and Members of the Committee:

I am pleased to be here today to explain this Administration's judicial philosophy, what the President seeks in his judicial appointees, how we in the Department of Justice go about trying to determine who might measure up to those standards, and what the early returns reveal about the results of our efforts.

The debate spawned by this Administration's judicial selection process has served a valuable purpose in focusing public attention on the role of the courts in our system of limited, constitutional government. At the same time, exaggerated political rhetoric has led some to misunderstand this Administration's judicial selection process. Part of my statement today examines that process and dispels some of the myths which have become a common staple of public discourse on this issue.

But before I proceed to that discussion, I would like to discuss what this Administration sees as the appropriate scope of judicial power and its implications for the constitutional responsibility of those who appoint individuals to exercise that power.

I.

President Reagan has a solemn constitutional obligation to "preserve, protect, and defend the Constitution of the United States." In that regard, one of the most important responsibilities of the President is the exercise of his appointment authority under Article II, Sec. 2, of the Constitution to determine the character of the federal courts, a co-equal branch of the national government. To ensure that the Constitution is preserved, protected, and defended, President Reagan is determined to appoint to the federal courts only those individuals who are committed to the rule of law and to the enforcement of the Constitution and statutes as those were adopted by "we the people" and their elected representatives. President Reagan would be derelict of his constitutional duty if he were to appoint judges who were willing to create new constitutional "rights" out of thin air, usurp legislative and executive functions, or otherwise give short shrift to the will of "we the people" as expressed in the written law.

Judicial office is one of the highest of all public trusts. It demands and deserves the best talent our country has to offer. Consequently, the President seeks to appoint to the bench only those who have the intellectual capacity to deal with the difficult legal issues of a complex society, who have the legal training and experience necessary to take on the important duties of the bench, and who are of the highest personal integrity. He seeks to appoint individuals who are intensely committed to the American constitutional ideal of equal justice for all under law. In order to find such individuals with the requisite professional and personal qualifications, the President seeks to consider the broadest possible range of individuals, regardless of race, gender, national origin, or religious affiliation.

In exercising his appointment power, the President also takes care that his nominees possess those important personal qualities that make for a proper judicial temperament. Those intangible qualities include a willingness to listen fully and fairly to all sides of an issue, and never to pre-judge a case; an appreciation of the need to avoid even the appearance of judicial conflict of interest; a sense of compassion; a willingness to work hard to carry out the court's business without delay; and the demeanor necessary to treat every litigant and witness and counsel courteously and respectfully at all times. The President is determined that his appointees will carry out their duties with dignity, propriety, even-handedness and professionalism. Many of these qualities are elusive and difficult to judge in an individual who has not already served in a judicial capacity. Substantial effort is undertaken, however, to identify these to the best of our abilities.

But for a President charged with preserving, protecting, and defending the Constitution, the search for judicial candidates with legal proficiency and judicial temperament, while critical, is not the end of the process. It is also necessary that those to be appointed demonstrate a sound understanding of the proper role of judges under our Constitution, which by its own terms, is the "supreme law of the land." Such individuals must demonstrate an understanding that federal judges, no less than members of the Congress, executive branch officials, and State and local legislators, are constrained to act always within the bounds set by the Constitution -- that federal judges, in President Franklin Roosevelt's words, are charged "to do justice under the Constitution, not over it."

Such an understanding does not require any particular view of public policy, and has nothing to do with a judge's personal political predilections. It is one thing for a judge to think that some particular public policy is wise or foolish, prudent or imprudent. It is quite a different matter, however, for that judge to think it appropriate for him, rather than the people through their elected representatives, to sit in judgment on the wisdom of or necessity for that policy.

The proper role of a judge within our constitutional system is not at all difficult to discern. Our government is based upon the consent of the governed. This was proclaimed as just by the

Declaration of Independence and established as law by Article VII and Article V of our Constitution. Article VII provides that the Constitution would become effective when consented to by all of the States to be bound by it. Article V provides that the Constitution may be amended only with the consent of three-fourths of these States. The Constitution, so agreed to, provides for the adoption of federal laws on enumerated subjects only by elected representatives of the people of the United States. Art. I, § 1 establishes that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."

The Constitution and laws passed pursuant to it, of course, have meanings; otherwise, the very idea of consent -- of ratifying or amending the Constitution or voting for or against laws -- would be a nullity. Consent must mean knowing consent, and knowing consent is possible only if the constitutional provisions consented to have ascertainable meanings.

It is, in fact, those meanings that are established by Article VI of the Constitution as the supreme law of the land, binding not only on the legislative and executive branches but also on the judges in every state, including federal judges. As Chief Justice John Marshall said in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), "The framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as the legislature." (emphasis in the original).

The classical conception of the judge's role in our system of government was guided by a standard of fidelity to the Constitution as written. If a statute were challenged as unconstitutional, the judge's inquiry was limited to whether the statute in question exceeded a power granted in the Constitution or ran afoul of a prohibition contained in the Constitution. At the core of this vision was the belief that judicial power stemmed from the consent of the people, and could be used solely to effectuate the will of the people as authoritatively expressed in the Constitution the people ratified. "We the people" were sovereign, and the judge's role was to act as the agent of the sovereign people in insuring adherence to our highest law. What guided a judge in the exercise of the judicial power was a standard established in the four corners of the Constitution.

Thus, the function of judges is to seek out those meanings consented to by the people -- as Marshall wrote in Marbury, "to say what the law is," rather than what they think it should be -- and to apply that law as required by Article III of the Constitution to the facts of particular "cases" or "controversies" presented to them. As President Reagan said at the investiture of Chief Justice Rehnquist and Associate Justice Scalia:

> Hamilton, Jefferson and all the Founding Fathers recognized that the Constitution is the supreme and ultimate expression of the will of the American people. They saw that no one in office could remain above it, if freedom were to survive through the ages. They understood that, in the words of James Madison, if "the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers." The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not -- as it is not -- will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people? And this is why the principle of judicial restraint has had an honored place in our tradition. Progressive as well as conservative judges have insisted on its importance -- Justice Holmes, for example, and Justice Felix Frankfurter, who once said, "The highest example of judicial duty is to subordinate one's personal will and one's private views to the law."

Until as recently as twenty-five years ago, President Reagan's views on the role of courts in our society would have been viewed as self-evident axioms, about which there could be no controversy. Over the last two and a half decades, however, these first principles of our constitutional order have faced increasing challenge. It might be helpful to compare these first principles with some currently fashionable alternatives.

Instead of taking the words of the Constitution as the lodestar for its meaning, a variety of new (and often mutually contradictory) standards have been proposed in the past twenty-five years to guide judges in exercising their functions. Among these standards are those which would evaluate legislative and executive actions in terms of their consistency with "deeply imbedded cultural values," [1] "moral evolution," [2] "the well-being of our society," [3] "the settled weight of responsible opinion" and "judgments of social importance," [4] "autonomy and equal concern and respect," [5] "a fusion of constitutional law and moral theory," [6] "the dignity of full membership in society," [7] and judges' own "personal preferences and substantive value judgments." [8] What each of these alternatives has in common is that they purport to authorize judges to look outside the Constitution ratified by the people and outside the statutory language adopted by the people's elected representatives to find a source of law. Yet Article V of the Constitution makes the Constitution and the laws and treaties adopted pursuant to it "the supreme Law of the Land."

---

[1] G. White, Patterns of American Legal Thought 160 (1978).

[2] Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U.L. Rev. 278 (1981).

[3] Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 226 (1980).

[4] Tushnet, The Newer Property: Suggestions for the Revival of Substantive Due Process, 1975 Sup. Ct. Rev. 261, 279-80.

[5] Richards, Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution, 127 U. Pa. L. Rev. 1195, 1228 (1979) (footnote omitted).

[6] R. Dworkin, Taking Rights Seriously 149 (1977).

[7] Karst, The Supreme Court, 1976 Term - Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 5-6 (1977) (footnotes omitted).

[8] Forrester, Are We Ready for Truth in Judging?, 63 A.B.A.J. 1212 (1977).

What each of these alternative proposed standards has in common is a rejection of the belief in popular sovereignty. Under each of these extra-constitutional standards, a judge would be authorized to strike down a duly enacted law not because "we the people" so required in the Constitution, but because the judge looked to some source of "higher law" which did not derive its validity from the consent of the people. The President's judicial philosophy would preserve our cherished national ideal of self-government. The alternatives would not.

Self-government is the essence of the American experiment, but in recent years, observers of all political perspectives have rightly become concerned that the American capacity for self-government has been eroded as the federal judiciary has increasingly asserted its control over matters that, under our constitutional scheme, are rightly the province of the coordinate branches of the national government, States, local governments, and the private sector. The growth in the power of the courts has correspondingly reduced the power of the elected representatives of the people, and thus the ability of individuals to control their destiny by occasionally "throwing the rascals out of office." Concomitantly, the prestige of the judicial branch has increasingly been threatened as it has performed more quasi-legislative functions and become more like just another political body. Indeed, because of this rise of what some have called an "imperial judiciary," 9/ federal judges have arguably become among the most important actors in the determination of domestic social policy in the United States.

II.

We all recognize the constitutional responsibility and duty of the federal courts, however, to uphold the requirements of the Constitution or of federal law, even if this sometimes defeats the policy objectives of the popular branches of the government. This is necessary and inevitable in a system where a written, permanent Constitution reigns as the supreme law of the land. But that special responsibility of the courts to uphold and carry out the mandate of the law does not justify instances where judges clearly have gone beyond the requirements of the Constitution or the laws of the United States and imposed instead a result based upon their own concepts of desirable social policy, however high-minded those policies might seem.

9/ See e.g., Glazer, "Towards An Imperial Judiciary," reprinted in The American Commonwealth (Kristol, ed. 1976); see also C. Wolfe, The Rise of Modern Judicial Review (1986); D. Horowitz, The Courts and Social Policy (1977); Kurland, "Government by Judiciary," Modern Age, Fall, 1976, at 358; and W. Berns, Taking the Constitution Seriously (1987).

There can be little doubt that some judges have increasingly substituted their own policy judgments for constitutional or statutory rules of decision in cases that have come before them. Through this kind of judicial overreaching -- by which I mean a judge's assertion of and exercise of authority constitutionally reserved to other branches of government -- judges have involved themselves in American public policy beyond their constitutional warrant. Particularly where such authority is exercised in the name of the Constitution, these decisions have preempted the proper democratic decision-making process and withdrawn legitimate issues from debate within the popular legislative arena.

The wisdom of various policy judgments imposed by the judiciary is not the issue here; people can and do take different views of the results in particular cases. Indeed, this kind of judicial overreaching continues precisely because many people approve of the policy results that can be obtained summarily from the courts rather than having to depend upon the more extended give-and-take and negotiation and compromise of the federal, state, or local legislative processes. But the results in particular cases, however visionary, should not blind us to the consequences of transferring the determination of public policy decisions from the representative branches of federal, state, and local governments to the unaccountable federal judiciary.

Perhaps the best way to emphasize this concern that judges recognize the importance of putting aside personal preferences in the process of adjudication and abiding by the clear direction of the Constitution is to consider some illustrations of judges failing to do this. I have chosen several cases of varying significance to illustrate the point. Again, I emphasize that the public policies resulting from these decisions is not at issue, but rather the decision-making processes.

In Kite v. Marshall, 494 F. Supp. 227 (S.D. Tex 1980), the plaintiffs challenged a Texas high school athletic association rule suspending from varsity athletics for one year any high school student who attended a special summer training camp. A federal district judge analyzed the scope of "constitutional protection under the family's fundamental right of personal privacy" and declared that the student's parents had, under the "penumbras" of the First, Fourth, Fifth, and Fourteenth Amendments, a fundamental constitutional right "to send a child to summer basketball camp." The judge then applied the strict scrutiny standard of review, and struck down the rule as unconstitutional because a student made ineligible by the rule "may not endeavor to achieve success in this area and feel the rewards that it brings, and may not participate in a cooperative team activity and experience the fellowship it involves." Id. at 233.

In Plyler v. Doe, 457 U.S. 202 (1982), the Supreme Court struck down a Texas law limiting free public education to school-age children who are either United States citizens or legal resident aliens, and held that the Equal Protection Clause of the Fourteenth Amendment required the state to provide free public education to illegal alien children, people whom Congress has forbidden to enter the United States, and has made subject to deportation should they be apprehended. In reaching this conclusion, the Court recognized that illegal aliens are not a "suspect class" under the Equal Protection Clause, and that education is not a "fundamental right" under the Constitution, id. at 219 n.19, 221, but based its decision on its own resolution of the "most difficult problems for [the] Nation" presented by the Texas law. Rather than deferring to the judgment of Congress that illegal aliens are not to remain in this country, and the judgment of the State of Texas as to the "preservation of the state's limited resources for the education of its lawful residents," id. at 227, the Court undertook to weigh for itself what it believed to be the relevant public policy interests and concluded that "[w]e cannot ignore the significant social costs" of the Texas policy. Id. at 224. One concurring Justice spoke of the "social necessity of an education," id. at 235, while another weighed "the consequences to the State itself" and concluded that "children should not be left on the streets uneducated." Id. at 239, 238. However, as argued by the four dissenting Justices in the case, "the

Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policy-making role . . . . The Court makes no attempt to disguise that it is acting to make up for Congress' lack of 'effective leadership' . . . [using] the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver." Id. at 242-43.

Recently, a federal judge in Kansas City, Missouri has undertaken direct supervision of the maintenance and repair of the city school system in the course of ruling on a desegregation plan. Jenkins v. Missouri, No. 77-0420-CV-W-4 (W.D. Mo. Sept. 15, 1987). The court specifically criticized the state's own approach because it only focused on improvements that were "necessary to eliminate health and safety hazards and to provide a good learning environment." Not satisfied with the state's proposals to fund improvements in the schools, the judge concluded that school buildings with "mismatched carpeting and tile" or "individual walls possessing different shades of paint" would not satisfy "the visual attractiveness sought by the Court." The court's order also provides for the construction of numerous new school buildings, and includes such matters as a 25-acre farm (complete with animals, barn, and a groundskeeper), a

25-acre wilderness area, numerous Olympic-sized swimming pools, and a model United Nations lab. To pay for these and other capital improvements, the judge evaluated the school board's request for "funding relief" and simply ordered the state to impose an income tax surcharge on all persons who reside or work within the school district. Despite the unwillingness of the residents of the school district to approve tax increases to pay for the kinds of improvements approved by the court, the judge also ordered that the city property tax rate be almost doubled, stating his determination "not only to eliminate the effects of unlawful segregation" but to "fund an operating budget which can provide quality education, including a high quality faculty." While it is true that the judge in some instances simply ratified the school board's requests, it is also true that innumerable school districts throughout the country would equally appreciate such amenities as new school buildings, pools, wilderness areas, faculty salary increases, and other budget increases to pay for "quality education," yet must pursue those goals in light of available funding and competing demands for city services. The judge here took it upon himself to order these expenditures, and the tax increases to pay for them (including income taxes on persons not even residing within the school district), without having to consider the willingness of the city or state government or the taxpayers to devote such substantial sums to the schools as opposed to other public projects and activities such as police protection, transportation, or housing.

In a similar case, Liddell v. Board of Education, 567 F. Supp. 1037 (E.D. Mo. 1983), another district judge ordered the St. Louis Board of Education to implement a specific financing plan to fund its obligations under a consent decree mandating massive suburban city busing, a plan lauded by the judge as one of the "most creative social experiments of our time." 567 F. Supp. at 1041. The judge ordered the school board to submit a bond issue to the voters sufficient to meet the costs of the plan, and enjoined the school board and the State -- at the request of the board and the plaintiffs -- from complying with a recent state referendum rolling back property taxes. Id. at 1054. The judge ordered that the revenues so retained were to be allocated to the costs of the plan, and additionally warned the voters of St. Louis that, if these measures failed to raise the necessary revenues, he would enter an appropriate order raising property taxes as necessary to meet the shortfall. Id. The judge also took the time to berate state officials for providing inadequate funding for all public schools in the state:

> While the state claims it is experiencing financial constraints, it has not responded historically to the educational needs of its school age children . . . . "[O]nly one state in the country appropriates less funds than the State of Missouri for its educational system."

Id. at 1052.

In Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1985), a panel of the U.S. Court of Appeals for the Fifth Circuit struck down as unconstitutional an Opelousas, Louisiana, ordinance prohibiting unemancipated minors under the age of seventeen from "being on the public streets or in a public place between 11:00 p.m. and 4:00 a.m., Sunday through Thursday, and 1:00 a.m. and 4:00 a.m., Friday and Saturday." 658 F.2d at 1070. The court found that the statute infringed on the "fundamental rights" of minors by being overbroad and failing to provide exceptions for employment, associational, and travel interests. While the wisdom of the ordinance is open to debate, the court's decision preempted that debate for the people of Opelousas and dictated an outcome.

In Barnstone v. University of Houston, 514 F. Supp. 670 (S.D. Tex. 1980), a district judge, at the request of a viewer, ordered a public television station owned by the University of Houston to broadcast a controversial program, "The Death of a Princess," after the station announced that it would cancel the previously-scheduled program in the face of requests to do so from the government of Saudi Arabia. At the outset, the judge agreed with the plaintiffs' contention that individual viewers had standing to allege that the station's decision "deprived them of their right to view a program which they were constitutionally entitled to see." Id. at 679. The judge ruled that the station was a "public forum," that viewers had a First Amendment constitutional right "to be free of governmental control over the content of programs presented to them," and that the station's decision not to broadcast the program on the basis of its content was a "prior restraint" on the original producers of the program. Id. at 688-89. However, as the court of appeals later ruled, public television stations are not public forums available to broadcast the messages of all applicants and the First Amendment does not preclude broadcasters, even public broadcasters, from exercising editorial control over its own medium of expression; the contrary rule "would render virtually every programming decision subject to judicial challenge." 688 F.2d at 1044 (5th Cir. 1982).

In Boyd v. Board of Directors of McGehee High School District, 612 F. Supp. 86 (E.D. Ark. 1985), a federal district judge intervened in a hotly disputed high school homecoming queen election. The court granted a preliminary injunction ordering the school's football coach (who conducted the original, disputed election) to hold a new election with a voting machine, and further ordered that a football player suspended from the team by the coach for walking out of a pep rally and refusing to play at that night's game (as a protest against the coach's alleged racially-motivated manipulation of the election) be reinstated with full privileges pending a trial on the merits. At trial the judge ruled the election issue moot (as the new election with the voting machine led to the same result and the aggrieved homecoming queen candidate did not appear at trial to press her claims), but awarded the suspended player $250 in nominal damages and $1,000 in punitive damages from the coach for the deprivation of his First Amendment free speech and Fourteenth Amendment due process rights. The judge reasoned that the player's boycott of the game was entitled to First Amendment protection, and that his "privilege of participating in interscholastic athletics" was a property interest protected by the Fourteenth Amendment entitling him to a hearing before being suspended from the team.

In Deweese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987), the court of appeals considered a municipal ordinance prohibiting anyone from appearing shirtless on public streets, which was challenged by a male jogger. The court held that a person's "liberty interest in personal dress," as with hair styles, is "within the great host of liberties protected by the Fourteenth Amendment from arbitrary state action," and rejected the town's effort to justify the rule as a means of preserving "the Town's history, tradition, identity, or quality of life," or as a means of "enforcing the town fathers' view of the proper fashion for personal dress in Palm Beach."

In a 1985 decision from the federal district court in Houston, United States v. Scott, a stockbroker who had been convicted of making false statements to lending institutions petitioned the court to expunge all records of her felony conviction, suggesting that society would be better served if she could achieve her full career potential without the handicap of a felony conviction record. The district judge agreed, and without any authority to do so, ordered all government offices -- State as well as federal -- to "expunge and obliterate all records and files . . . that relate to the conviction." The court of appeals summarily vacated the order on the ground that the judge exceeded her authority. See United States v. Scott, 793 F.2d 117 (5th Cir. 1986).

And in Dorr v. First Kentucky National Corporation, 796 F.2d 179, 55 U.S.L.W. 2071 (6th Cir. 1986) (vacated upon rehearing en banc), a 2-1 decision of the court of appeals held that the religious discrimination prohibition of Title VII of the Civil Rights Act of 1964 barred a bank from taking any action against one of its executives when he began to publicly advocate homosexual rights in his capacity as a member of an Episcopalian homosexual group. The bank's official policy barred employees from engaging in outside activities which might undermine public confidence in the bank, but the court concluded that because the executive believed his homosexual advocacy to be a "religious calling" and an "area of ministry," though not required by his religion, the bank was discriminating against him on the basis of religion in violation of Title VII.

Judicial over-reaching is not limited to the above cases. The federal case law is replete with cases in which judges have superimposed their own judgment over that of elected representatives by creating new "rights", administering institutions, ordering public budgeting decisions, ignoring or misreading the clear meaning of statutes or legislative history, using the supposed vagueness of constitutional clauses as a basis for converting their own personal policy views into law, deciding cases on the basis of social policy instead of law, expanding the meaning of constitutional clauses beyond anything that could have been reasonably intended by their drafters, and forcing the release or retrial of convicted criminals on the basis of non-constitutional "prophylactic rules."

While all courts inevitably will be confronted with difficult controversies, and fine lines, where any decision may be subject to debate among reasonable men and women, we believe that resolving such controversies through resort to traditional methods of legal interpretation is the surest means to do justice while preserving the proper role of the judiciary.

III.

The increasing exercise of policy-making authority by some who wield judicial power led President Reagan prior to his initial election to promise that he would appoint individuals to the bench who understood the proper role of judges within our constitutional order. I turn now to the system that the President has established to carry out his pledge.

The President's objective is to nominate and appoint to the federal bench those individuals with the requisite intellect, temperament, and professional fitness, and who are also committed to applying the written law as they find it, rather than as they think it ought to be. To accomplish this objective, the Justice Department and the White House have developed what we believe to be a thorough, rigorous, and open system for identifying and screening candidates for nomination to the federal bench.

For district court vacancies, the Administration requests the names of at least three candidates from a State's senior Republican senator, or in the absence of at least any Republican senator, from a State's Republican House delegation. The President also will often recommend candidates to members of Congress for their consideration in this process.

This Administration believes strongly that, under Art. II, § 2, the nomination function is ultimately the Executive's. Accordingly, it has not been willing to accept Members' district court recommendations on a "take it or leave it" basis. Quite naturally, this is an area of recurrent tension between any Administration and the Congress.

The Administration will try to find an acceptable candidate for a district court position from among those names submitted by a senator or congressman, but it reserves the right to request additional names if those submitted fall short of the President's standards. This assertion of presidential authority in the identification of district court candidates is consistent with the practice of recent administrations. 10/

Because the jurisdiction of a circuit court encompasses more than a single state, there is substantially less deference to members of Congress in identifying prospective candidates for these courts. The Reagan Administration reserves to itself the prerogative of determining the pool of circuit court candidates, a practice again consistent with those of all recent

---

10/ Fowler, Judicial Selection Under Reagan and Carter: A Comparison of Their Initial Recommendation Procedures, Judicature, Jan. 1984, at 266. The Carter Administration maintained the traditional practice of deferring to senatorial courtesy in the identification of district court candidates, but also made it clear that it was willing to reject a senator's candidate if the district court candidate was, for whatever reason, unsatisfactory to the Administration.

This reassertion of authority reversed a long pattern of Executive branch relinquishment of power in identifying district court candidates, a pattern interrupted most notably in recent years by President Kennedy and his Attorney General. In 1953, one scholar wrote that "[t]he custom of senatorial courtesy . . . has in effect transferred from the President to the senators of his own party the selection of district judges in their own state." Harris, The Advice and Consent of the Senate 224 (1953).

administrations,[11] with the principal difference being the

---

[11] Id. at 266. The Carter Administration exercised this prerogative of the executive with regard to circuit court vacancies by establishing a circuit court nominating commission composed of individuals selected by the Administration. This commission established panels for identifying and recommending candidates for vacancies from various States. Id. at 267-68. These so called "merit" commissions, however, were not "merit" commissions from everyone's perspective. A 1979 study commissioned by the non-partisan American Judicature Society concluded that "[t]he Circuit Judge Nominating Commission may simply represent a form of merit selection of Democrats, by Democrats. If President Carter considered all the elements of a merit selection system, he excluded a crucial feature from his final plan: nonpartisanship. Partisan influences seem to have permeated the pre- and post-Commission stages: namely, the selection of panelists and the selection of nominees from the list of candidates." Berkson, Carbon, and Neff, A Study of the U.S. Circuit Judge Nominating Commission: Executive Summary, (Chicago: American Judicature Society, 1979), at 44. The authors of this study reported that over 87% of the first-round commissioners were Democrats, Judicature, July 1979, at 118. There were also allegations of questionable practices surrounding at least one of these nominating commissions. See Berkson and Carbon, The United States Nominating Commission: Its Members, Procedures, and Candidates at 53-54 (1980).

Apart from the defects peculiar to the Carter Administration's nominating panels, one can make the more generalized argument that nominating or merit commissions are likely to result in compromise selections, selections which are much more likely to be the lowest common denominator in quality. For analogous reasons, the founders specifically rejected lodging the appointment power of federal officers in a collective body -- the Congress -- and instead placed it with the executive. As Hamilton said in the 76th Federalist: "[O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices than a body of men or equal or perhaps superior attainment. The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on account, feel himself under stronger obligations and more interested to investigate with care the qualities requisite to the stations to be filled and to prefer with impartiality the persons who may have the fairest

(continued...)

extraordinary efforts this Administration has made on its own initiative to identify the broadest range of potential candidates.

In identifying candidates for circuit court vacancies, the Administration seeks names from members of Congress. In addition, however, the Administration also solicits names from a host of other sources: academics, party officials, private practitioners, incumbent judges, bar leaders, and other public officials. Indeed, we go further than this by accepting and considering names from virtually anyone willing to suggest a candidate. The Administration also identifies candidates through its efforts of keeping abreast of legal scholarship in the law reviews and other legal literature. These additional efforts are made to ensure that qualified individuals are not overlooked.

The broadness of the candidate-identifying process is one of the distinguishing features of this Administration's judicial selection efforts for the circuit courts. With respect to President Reagan's circuit nominees, one does not often hear the charges of "patronage" or "cronyism" that constituted the most frequent attack upon the judicial selection processes of many

---

11/(...continued)
pretensions to them." Whether or not one agrees with this perspective, it is by no means clear that "merit" selection panels are a better method of selecting judicial candidates.

earlier Administrations. [12] With regard to district court vacancies, we have encouraged senators to cast their nets as widely as possible in order to ensure that no qualified candidate is overlooked. The broadest possible field of candidates serves the public interest by allowing a more inclusive search for the very best quality in our judges.

---

[12] For all of the criticism our process has received, no one has suggested that the quip "a judge is a member of the bar who once knew a governor" is applicable to the Reagan Administration's judicial selection effort for circuit court vacancies.

This is in contrast to some earlier presidencies, against whom charges of cronyism were frequently leveled. Columnist Joseph Alsop once reported that "getting the foreign aid bill off the the cliff where it was so desperately dangling also required judgeships and public works and much other pork and patronage." H. Chase, Federal Judges: The Appointing Process 41-42 (1972). For many years Chicago Mayor Richard J. Daley personally approved every federal judge appointed in the Northern District of Illinois. During the Roosevelt Administration, when Roosevelt appointee Judge Peirson Hall was asked how important politics was to his appointment, he responded: "I worked hard for Franklin Roosevelt in the days when California had no Democratic Party to speak of. In 1939 I began running for the Senate, and the party convinced me it would be best if there wasn't a contest for the Democratic nomination. So I withdrew and campaigned for Martin Downey. They gave me this judgeship as sort of a consolation prize -- and one, I might add, that I have enjoyed." During the Truman Administration, the principal, if not exclusive, criterion in judicial selection was personal loyalty to Truman himself. For example, Truman was anxious to appoint Carroll O. Switzer to fill a judicial vacancy in Iowa. "He wanted to reward Switzer for sticking with him in the 1948 presidential campaign when so many others had deserted him, and he couldn't have cared less whether Switzer was a liberal or a conservative." Carp and Stidham, The Federal Courts, 99-100, 105, 112 (1985).

At the outset of his Administration, the President made an unequivocal commitment to the Fourteenth Amendment principle of equal treatment and equal opportunity. In keeping faith with that pledge to the American people, the Administration, in its appointments to the judiciary, has viewed racial, gender, ethnic, or religious group memberships as irrelevant. The process is open to individuals without regard to these considerations. Further, efforts have been undertaken to identify individuals from a wide variety of backgrounds to participate in the judicial selection process. We have not attempted, however, to ensure the nomination of particular proportions of individuals from particular racial, gender, ethnic, or religious groups. 13/

IV.

In its efforts to identify candidates for appointment to the United States Court of Appeals for the District of Columbia Circuit, this Administration has (like previous Administrations), looked to able attorneys from across the nation. This practice

---

13/ We readily concede that this approach is in marked contrast with that of the previous Administration. President Carter's Attorney General testified that "Mr. Carter was prepared to appoint to the federal bench a black, Hispanic, or woman lawyer who was found to be less qualified than a white male so long as the appointee was found qualified." President Carter himself said at a press conference that "If I didn't have to get Senate confirmation of appointees, I could tell you flatly that 12% of my appointees would be black and 3% would be Spanish speaking and 40% would be women and so forth." H. Abraham, The Judicial Process 31-32 (5th ed. 1986). One wonders about the implications of the "and so forth."

has recently come under attack from several quarters, most notably the District of Columbia Bar.

The District of Columbia Bar has questioned a number of President Reagan's nominees to the D.C. Circuit over the past seven years, including Judges James Buckley, Stephen Williams, and David Sentelle. The representatives of the Bar have freely admitted that their concerns are not based upon the objective qualifications of these nominees, but upon the fact that they were not selected from its own membership. [14] As Paul Friedman, then president of the D.C. Bar, stated during the confirmation hearings of one nominee: "These individuals, while in many cases extremely talented and able, nevertheless have been brought to Washington from elsewhere." [15] As Mr. Friedman himself recognized, however, the practice of looking outside of the Washington legal community for nominees to the D.C. Circuit dates back to Franklin Roosevelt:

> [T]here is a long practice that has been followed by every President at least since Franklin Roosevelt to look outside the Bar of

---

[14] In point of fact, four of President Reagan's eight appointees to the D.C. Circuit, Judges Bork, Starr, Silberman and Buckley, were members of the D.C. Bar at the time of their appointments.

[15] Confirmation Hearings on Federal Appointments: Hearings Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 259 (1986) (statement of Paul L. Friedman, President of the District of Columbia Bar on the Nomination of Douglas Ginsburg to the United States Court of Appeals for the District of Columbia Circuit) [hereinafter Friedman Statement].

> this city when seeking candidates for appointment to the United States Court of Appeals for the District of Columbia Circuit. [16]

For the reasons discussed below, we believe that the Bar's criticism, however well-intentioned, is wholly unjustified and misdirected.

1.

First, it must be understood that the federal courts in the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia, are not the "local" courts of the District of Columbia. Matters of local concern are under the jurisdiction of the specific Article I federal courts of the District of Columbia. Since the District was granted home rule in 1974, cases of purely local concern, including the great majority of criminal cases, have been brought before the Superior Court of the District of Columbia, with appeal to the Court of Appeals of the District of Columbia. Members of the District of Columbia Bar are traditionally selected to serve upon those courts, the only truly local courts in the District. [17]

---

[16] Friedman Statement at 260-61.

[17] In fact, members of the D.C. Bar are also often selected to fill vacancies on the United States District Court for the District of Columbia. For instance, all of President (continued...)

The District of Columbia is the capital of the United States. As a result, the Article III federal courts sitting in the District differ fundamentally from other federal district and circuit courts of appeal. This is particularly true of the United States Court of Appeals for the District of Columbia. Like the Supreme Court itself, the District of Columbia Circuit is a national court. It should not be subjected to the parochial interests of the local bar any more than should the Supreme Court. In a very real sense, the local bar of the District of Columbia has no greater claim upon vacancies on the D.C. Circuit than does the local bar of Wilmington, Boston, Cleveland, Wheeling, Chicago, Birmingham, Montpelier, or Phoenix.

The cases heard by the D.C. Circuit are determined by the character of the appeals it hears, and by specific grants of jurisdiction made to it by Congress. The types of cases heard by the D.C. Circuit are, therefore, heavily influenced by the sorts of cases decided by the United States District Court for the District of Columbia and brought to the Circuit on appeal.

A review of the United States Code reveals approximately 200 separate federal statutory grants of either exclusive or concurrent jurisdiction to the D.C. District Court, allowing it

---

17/ (...continued)
Reagan's appointments to the D.C. District Court have been members of the D.C. Bar.

to hear cases from every corner of the nation. With regard to congressional grants of exclusive jurisdiction, the following examples illustrate the wide variety of substantive matters that can be brought only in the D.C. District Court. Pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1973l(b), any action by a state or political subdivision seeking declaratory judgment, temporary or permanent injunctive relief, or a restraining order in regard to an alleged abridgment of voting rights must be brought in the D.C. District Court; the Emergency Natural Gas Act of 1977, 15 U.S.C. § 7172(g), specifies that, in instances when the President declares a natural gas supply emergency, the D.C. District Court has exclusive jurisdiction to hear claims for injunctive relief from any order issued in regard to such emergency; in accordance with 2 U.S.C. § 159, any suits against the Trust Fund Board of the Library of Congress regarding enforcement of the terms of the trusts it administers must be brought in the D.C. District Court; the Presidential Records Act of 1978, 44 U.S.C. § 2204(a), confers exclusive jurisdiction upon the D.C. District Court to hear claims brought by former presidents regarding disclosure of certain presidential documents.

Congressional enactments singling out the D.C. District Court for special grants of concurrent jurisdiction are also numerous. For instance, pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and the Privacy Act, 5 U.S.C.

§ 552a(g)(5), the D.C. District Court has concurrent jurisdiction over all civil actions regarding the maintenance and dissemination of federal agency records. The Commodity Exchange Act, 7 U.S.C. § 13a-2, gives the court jurisdiction to hear cases involving alleged violations of the regulations of the Commodity Futures Trading Commission, regardless of where the violations may have occurred. Similarly, certain suits by directors and officers of federally insured savings and loan associations may be properly filed in the D.C. District Court in accordance with 12 U.S.C. § 1730(g)(5). Under 29 U.S.C. § 440, the Secretary of Labor may bring a wide variety of actions against labor organizations in the D.C. District Court. The Ocean Thermal Conversion Act of 1980, 42 U.S.C. § 9124(a), gives the D.C. District Court concurrent jurisdiction to hear claims for equitable relief brought pursuant to that Act.

In addition to these specialized grants of concurrent jurisdiction, the venue provisions in 28 U.S.C. § 1391(e) further broaden the number and type of cases that can be brought in the D.C. District Court. It provides that a civil action against the United States, a federal agency, or an officer or employee thereof acting in his official capacity or under color of legal authority, may be brought in any judicial district, inter alia, in which a defendant resides, or the cause of action arose. Because the residence of the federal government and almost all of its various subordinate agencies is the District of Columbia, see, e.g., Lamont v. Haig, 590 F.2d 1124, 1128 n.19 (D.C. Cir. 1978), a suit against an agency or officer of the federal government may generally be brought in U.S. District Court for the District of Columbia, regardless of where the events in controversy took place.

With respect to virtually all of these specialized or concurrent grants of jurisdiction to the D.C. District Court, appeals from the decisions of the district court are taken to the D.C. Circuit.

In addition to its appellate jurisdiction over the D.C. District Court, various statutes vest in the D.C. Circuit exclusive appellate review of administrative matters, regardless of where in the nation the controversy arose. For instance, the Communications Act, 47 U.S.C. § 402(b), provides for exclusive review in the D.C. Circuit of all FCC actions involving the grant or denial of an application for a construction permit or a station license. It does not matter in the least where the proposed station is to be built, or where the license applicants reside. They must plead their cause in the District of Columbia. Similarly, the International Claims Settlement Act of 1949, 22 U.S.C. § 1631 f(b); the Merchant Marine Act of 1936, 46 U.S.C. § 1181(b); the Energy Policy Conservation Act, 42 U.S.C. § 6384(b); the Clean Air Act, 24 U.S.C. § 7607(b); the Noise Control Act, 42 U.S.C. § 4915; the Federal Energy Administration

Act, 15 U.S.C. § 766; the Outer Continental Shelf Leasing Program, 43 U.S.C. § 1349(c)(1); the Resource Conservation and Recovery Act, 43 U.S.C. § 6976(a); and the Safe Drinking Water Act, 42 U.S.C. § 300j-7(a), all provide for exclusive review of certain agency actions by the D.C. Circuit. The concentration of exclusive appellate jurisdiction over such matters means that the D.C. Circuit monitors extensive regulatory programs involving national environmental, safety and economic concerns. In many cases the D.C. Circuit is the final arbiter of these national concerns.

Because of these statutory grants, the quantity and type of cases heard by the D.C. Circuit differ significantly from those of other federal circuit courts, with a large proportion involving claims that pertain to individuals and geographic areas thousands of miles away. In the area of administrative law the importance of the D.C. Circuit cannot be overestimated. During the year ending September 30, 1987, of the 1,597 cases commenced in the D.C. Circuit, fully 783 cases or 49% were direct petitions for review of decisions of administrative agencies, and another 373 cases or 23% were civil cases in which the United States was a party (many of which were appeals from the D.C. District Court in administrative cases where that court had exclusive or concurrent jurisdiction). By contrast, during the same period, of the cases filed in the Second Circuit (including New York), 6.5% were administrative appeals and 13% were federal civil cases; of the cases filed in the Ninth Circuit (including California and other Western states), 8% were administrative appeals and 15% were federal civil cases; of the cases filed in the Seventh Circuit (including the City of Chicago), 6.5% were administrative appeals and 8% were federal civil cases; and of the combined appeals to the Fifth and Eleventh Circuits (covering six Southern states from Texas to Florida) only 4% were administrative appeals and 9% were federal civil cases. 18/

2.

These numerous grants of special jurisdiction to the federal courts sitting in the District represent a recognition on the part of Congress that they, and especially the D.C. Circuit, occupy a unique national position in the federal court structure. These courts face national issues and render decisions with nationwide significance. In fact, to the extent that cases in the D.C. federal courts have a uniquely local impact, that impact is felt most often not in the District of Columbia but in localities thousands of miles away.

An excellent example of the far-reaching jurisdiction and influence of the federal courts in the District of Columbia can be found in Wilderness Society v. Morton, 479 F.2d 842 (D.C.

18/ Administrative Office of the United States Courts, Federal Judicial Workload Statistics (Sept. 1987).

Cir.), cert. denied, 411 U.S. 917 (1973). In that case the D.C. Circuit, reviewing a decision of the D.C. District Court, enjoined the Secretary of the Interior from issuing certain land use permits granted for the Alaska oil pipeline. Even though the outcome of the suit had no effect at all on the District of Columbia or its residents, it was brought not in the United States District Court for the District of Alaska, but in the Washington, D.C.

Another telling example of the D.C. Circuit's far reaching influence can be found in Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). In that case the Environmental Defense Fund sought review in the D.C. Circuit when the Secretary of Agriculture failed to commence proceedings to ban all use of DDT. The D.C. Circuit ordered the Secretary to commence proceedings, and held that he had failed to provide an adequate explanation for his decision to deny interim relief pending a determination under the applicable statute. It noted that an administrator "has an obligation to articulate the criteria that he develops in making each individual decision. We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion." Id. at 596.

In this case the issue addressed by the court affected the entire United States, not merely the District of Columbia, and decided a crucial issue of administrative law. Not long after the case was decided, administrative law expert Professor Kenneth Culp Davis wrote, "[t]he leadership for the future [on this point] is provided by the Court of Appeals for the District of Columbia in Environmental Defense Fund v. Ruckelshaus." 19/

In case after case the decisions of the D.C. Circuit order life and society in localities far beyond the boundaries of the District of Columbia. In National Audubon Society v. Hester, 801 F.2d 405 (D.C. Cir. 1986), the National Audubon Society challenged the decision of the U.S. Fish & Wildlife Service to bring the six California Condors still known to live in the wild into captivity. The suit was brought in the D.C. District Court and appealed to the D.C. Circuit.

In Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980), certain environmental groups filed a complaint in the D.C. District Court, seeking to halt a program by the State of Alaska to thin the wolf packs roaming the state. The court refused to transfer the action to the District of Alaska and issued a preliminary injunction. Appeal was sought in the D.C. Circuit, and the order was reversed. The entire matter concerned the natural resources of Alaska; the District of Columbia had no

---

19/ See K. Davis, Administrative Law Text 332 (3d ed. 1974).

interest. Nevertheless, Washington is where the case was decided. [20]

3.

Therefore, as a result of its unique jurisdiction and location in the national capital, the D.C. Circuit hears a broad spectrum of cases involving issues that will substantially affect individuals and communities many hundreds and thousands of miles from the city of Washington. The local members of the D.C. Bar have no greater claim upon it than they have over the United States Supreme Court, the United States Court of Appeals for the Federal Circuit, the United States Claims Court, or any of the other national courts headquartered at the seat of government. It is entirely appropriate that the nominees to the D.C. Circuit should be drawn from the nation as a whole, and not merely the local Washington legal establishment. The Reagan Administration's practice of considering candidates from across the country for judicial vacancies on the court, including but not limited to those from the District of Columbia, is thus consistent with the character of the D.C. Circuit, as well as history and tradition.

---

[20] See also Hearing on S. 2419, a Bill to Amend Title 28, United States Code, Regarding Venue, and for Other Purposes, Before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. 16-27 (1982) (testimony of Assistant Attorney General Carol E. Dinkins) (discussing various cases brought in the D.C. District Court involving a coyote control program in Wyoming, water rights under the Salt River Project in Arizona, and coal-lease sales in the Powder River Basin of Montana and Wyoming).

The District of Columbia Court of Appeals itself has recognized the national character of the capital in allowing attorneys from all over the nation to be admitted to practice in the District without actually maintaining offices here. Not surprisingly, the membership of the D.C. Bar reflects the national character of the legal profession in the District of Columbia. According to its Membership Office, of the approximately 46,000 lawyers who are members of the D.C. Bar, some 20,000 (43.5%) do not even live in the Washington Metropolitan area. Of the resident members of the D.C. Bar, many do not practice primarily in the District.

4.

Finally, a look at President Reagan's appointees to the D.C. Circuit reflects an appropriate recognition of those who have practiced in the D.C. legal community. Four of his eight appointees to the D.C. Circuit -- Judges Robert Bork, Kenneth Starr, James Buckley, and Laurence Silberman -- actually were members of the D.C. Bar at the time of their appointments, and thus were among the pool of candidates from which the D.C. Bar representatives urge that appointments be made. Judge Bork, for instance, spent many years of his life working in the District of

Columbia, first as Solicitor General of the United States and then in private practice. Judge Kenneth Starr practiced in both government and in private practice in the District of Columbia for many years before his appointment. Judge Silberman had a distinguished career of public service in Washington, as well as private practice with some of the city's leading law firms. Justice Antonin Scalia, appointed to the D.C. Circuit in 1982, served in government in the District of Columbia from 1971 to 1977, and Judge Douglas Ginsburg also served in government positions in the District of Columbia for several years before his appointment to the bench. Thus, of the 8 appointments President Reagan has made to the D.C. Circuit, 6 have either been members of the D.C. Bar or have spent a significant part of their professional lives working in Washington.

The D.C. Bar, however, does not appear to consider these appointees, even those who are actually its own members, to have come from the Washington legal community. The Bar seems to consider only those of its members who actually live in the Washington Metropolitan Area suitable for appointment to the D.C. Circuit. There are more than 600,000 lawyers in the United States. We do not believe that the nation would be well served by limiting the selection of nominees to the D.C. Circuit (or even some proportion of seats on the D.C. Circuit), often called the second most important court in the nation, to those few lawyers who are members of the D.C. bar and who actually live in the Washington Metropolitan area.

While it is natural and certainly understandable for representatives of the D.C. Bar to lobby for the interest they represent, it would be entirely inappropriate for the Administration to allow a local bar association to monopolize any proportion of federal circuit court vacancies in the capital. In fact, it would be comparable to selecting Cabinet officers, under secretaries and assistant secretaries, from the District simply because the headquarters of the agencies they will run are located in Washington.

V.

Once potential candidates for a vacant judgeship are identified, there is an initial screening process conducted in the Office of Legal Policy of the Department of Justice. On the basis of a preliminary evaluation of a candidate's written work, comments of local bar leaders, other relevant information, and, of course, the recommendations of Members of Congress, a decision is made to invite to the Department of Justice for interviews those candidates exhibiting strong potential for satisfying the President's criteria as to temperament, professional ability and recognition of the proper scope of a judge's function.

When a candidate arrives at the Department of Justice, he goes through a series of interviews, coordinated by the Office of Legal Policy, with a battery of attorneys of widely varying backgrounds, both in the Office of Legal Policy and elsewhere in the Justice Department. Each interview generally runs between 30 minutes and one hour, and candidates generally average between four and five hours of interviews during their visit to the Department. We consider these interviews a critical part of our process, as they give us an opportunity to learn more about many individuals of whom we know relatively little. Interviews could be dispensed with, of course, if we limited consideration to those already known to Department officials or relied upon "old-boy networks" or if we simply looked to resume credentials to identify and screen candidates. But, as I mentioned earlier, precisely because we eschew this and have opened the process up to candidates who ordinarily would not have been seriously considered in the past, we make use of interviews as a method to help us take at least some measure of candidates. These interviews supplement our analysis of the candidate's written record and our communications with individuals in the state or district who can speak to the candidate's reputation and abilities.

During these meetings at the Department of Justice, Department interviewers seek to learn more of a candidate's background and professional experience and to determine whether he or she appreciates that the source of law for a self-governing citizenry is the consent of the people themselves as expressed in the Constitution and legislatively-enacted statutes, and not the judiciary; in other words, whether a candidate reasons from constitutional premises. Candidates who evince an intention to impose their policy preferences from the bench, whether liberal or conservative, are not selected.

As Attorney General Edwin Meese has said, "[a] jurisprudence that seeks fidelity to the Constitution . . . is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to de-politicize the law." This Administration, in its judicial selection efforts, is interested in fidelity to the law, not the results in particular cases. We are not interested so much, for example, in the conclusions reached by candidates in hypothetical discussions but in how and why they seem to be getting there.

Occasionally, in recent years, we have heard allegations that this Administration was somehow trying to achieve the opposite -- to "politicize" the judiciary through the use of "litmus tests." Rather, a fair look at the record not only shows that allegation to be completely untrue, but makes clear that the Administration stands out precisely because it does not use "litmus tests" to select judicial nominees.

Indeed, it is ironic that the "litmus test" allegations have only recently arisen in the context of this Administration's judicial selection process when there is so little evidence to support this charge. Part VI of my testimony addresses some of the highly questionable practices of the immediate predecessor administration in evaluating the personal beliefs and mores of its judicial nominees. And the recent confirmation debates over Judge Bork and Judge Kennedy demonstrated the use of dubious or irrelevant lines of inquiries by some participants in those proceedings. 21/

21/ During their recent confirmation hearings, for example, Judges Bork and Kennedy were asked their personal policy views on personal privacy, the Equal Rights Amendment, congressional standing, and antitrust, among other things. The Judges were also asked point-blank about how they would rule in specific cases dealing with many of those issues. One senator even refused to vote for Judge Bork's confirmation absent a commitment on Judge Bork's part that he would vote to uphold Roe v. Wade. These lines of inquiry were not limited to contemporary policy issues or legal issues certain to appear before the Court; Judge Bork was interrogated about long-since recanted policy views held over two decades ago.

Most disturbing, Judges Bork and Kennedy were attacked by some interest groups who evaluated their performances on the basis of ascriptive characteristics of prevailing parties in their decisions. For example, "Public Citizen" released a study that was quoted by at least one senator when he announced his intention to vote against Judge Bork's confirmation. This study, as quoted by the senator, found that "Judge Bork voted against individuals and workers in favor of the Government in 26 of 28 administrative law and constitutional split decisions. He also voted in favor of business and against the executive branch in eight out of eight administrative law split decisions. In cases where individuals sought the right to have their day in court, Judge Bork voted against the individuals in 14 out of 14 split cases." This was at best an intellectually bankrupt exercise; the performance of judges should be evaluated by

(continued...)

In stark contrast, no judicial candidate is ever subjected to ideological litmus tests by any Justice Department interviewer in the Reagan Administration. 22/ After examining the relevant evidence, Dr. Sheldon Goldman has concluded that "there is no objective evidence that a 'litmus test' in terms of specific policy views has been employed [by the Reagan Administration] to accept or reject candidates." 23/

What an interviewer does try to determine is whether a judicial candidate is prepared to set aside his own personal policy preferences on "political" issues and -- where the Constitution does not clearly foreclose such choices -- respect

---

21/(...continued)
whether they competently apply the relevant law, whatever the results may be. At worst this criticism seems to imply that judges may and should rule according to the identities of the parties before them, rather than according to law. Once again, this reveals how some of the critics of the Administration's judicial selection process have come to view adjudication as politics by other means.

22/ The Reagan Justice Department has interviewed well over one thousand judicial candidates over the past seven years for many fewer positions. Each interviewee was subjected to as many as five or six interviews. With (necessarily) so many disappointed candidates and so many interviews, real proof of such routine political questioning would not be hard to come by were such questioning in fact taking place. It is not.

23/ Goldman, Reagan's Second Term Judicial Appointments: The Battle At Midway, Judicature, April-May 1987, at 326. I am less than sanguine, however, that the absence of evidence about any supposed "litmus test" will put to rest a convenient argument often raised by some political critics of the judicial selection process of this Administration.

the determinations, be they liberal or conservative, made by the elected representatives of the people.

The interviewers are interested in a judicial candidate's approach to a wide range of issues -- these include, among others, federalism, the separation of powers, statutory interpretation, constitutional interpretation, criminal justice, and a candidate's reasons for wanting to go on the federal bench. No two interviews are the same, however, and there is no set list of questions that must be asked or issues that must be covered. There is also no question which a candidate must answer in a certain way or any issue on which a candidate must hold a particular view in order to receive the Department's *imprimatur*.

Nor does any Reagan Administration interviewer ask candidates about their personal political histories, their perspectives on contemporary issues of controversy such as abortion or school prayer, how they might rule in a specific case that is likely to come before them, or otherwise attempt to extract a commitment to rule a certain way in future litigation. Interviewers seek to determine only the analytical approaches of the candidates and the extent to which they reason from constitutional premises.

On the basis of these interviews, as well as further consideration of a candidate's background and telephone inquiries made by officials in the Office of Legal Policy to public officials, bar leaders, sitting judges, and others in a candidate's home state, the Office of Legal Policy prepares a summary of each competing candidate's qualifications for the Attorney General.

After meeting with other Department officials to discuss these summaries, the Attorney General selects one candidate to recommend to the President's Federal Judicial Selection Committee. This Committee is chaired by the Counsel to the President, and includes the Attorney General, the Deputy Attorney General, and the Assistant Attorney General for the Office of Legal Policy. Committee members normally receive the names of candidates that the Justice Department will be recommending several days before they meet in order to enable officials at the White House to do their own background checks. More than one judicial vacancy is usually discussed at a Committee meeting and the qualifications of the recommended candidates are discussed in some depth.

If a decision is made to move forward with a candidate whom the Justice Department recommended, the name of that individual is submitted to the Federal Bureau of Investigation for an extensive background check, as well as to the American Bar Association's Standing Committee on the Federal Judiciary, which conducts its own evaluation of the candidate.

The FBI investigation takes approximately five weeks, during which time the FBI speaks to approximately seventy or eighty individuals, more if the candidate has lived and worked in a variety of areas or turns out to be controversial in some aspect, fewer if the candidate has lived and practiced law in the same locale all his life and is not controversial.

The American Bar Association's Standing Committee on the Judiciary, which functions in its limited advisory role at the pleasure of the President, will notify the Administration of its evaluation of a candidate, as well as a specific rating, when completed with its work. During the ABA investigation, the member of its Committee who is charged with investigations within a particular candidate's federal judicial circuit will normally speak to between sixty and seventy lawyers familiar with the qualifications of the candidate in question. This investigation, however, is a confidential one and the details are unavailable even to the Administration.

If the FBI and ABA background investigations do not reveal any information which would call into question a candidate's fitness for the office, the Attorney General and the Counsel to the President will then recommend him to the President for formal nomination. It will sometimes be the case that the judicial candidates do not ultimately proceed to nomination because of information provided during the course of the ABA or FBI investigations.

The screening process for judicial candidates that the Reagan Administration has established is thorough and a rigorous one. The stakes, however, are so great -- life tenure in a post whose occupant will affect the lives, liberties, and fortunes of the citizens of our country -- that anything less would be irresponsible, and a breach of the President's fiduciary duty to the American people, who saw fit to entrust him with Article II executive power for two terms.

VI.

In establishing the judicial selection process that he has, President Reagan has attempted to depoliticize the federal bench and strengthen the rule of law as opposed to the rule of particular judges. This effort is in contrast in many respects to that of the previous administration to select judges who shared its ideological views on policy issues, and who seemed to view the courts as an important vehicle for promoting "progressive" public policies. This is to be distinguished from the more traditional practice of presidents looking to appoint judges generally compatible on questions of broad judicial philosophy as opposed to compatibility on discrete policy issues. 24/

In the spring of 1987, in a nationally-televised panel discussion on judicial selection, President Carter offered that on those occasions when he personally interviewed prospective judicial nominees, he would first inquire into their belief in God. 25/ This acknowledgement comes in the context of an analysis by the non-partisan American Judicature Society that the Carter Administration was determined that its judicial nominating commissions "consider and evaluate the social and legal philosophy and activity of candidates." 26/

In this regard, the Carter Administration's wishes were satisfied. In the American Judicature Society's study of the

---

24/ Dr. Henry Abraham of the University of Virginia, in his book The Judicial Process (5th ed. 1986), writes that presidents have traditionally evaluated potential judicial nominees on the basis of their philosophy and that accordingly "[a]ll presidents have tried to thus 'pack' the bench to a greater or lesser extent", including most notably Presidents Washington, Adams, Jefferson, Jackson, Lincoln, the first Roosevelt, Wilson, and Franklin Roosevelt. Id. at 74-75.

25/ This program was an episode of Fred Friendly's The Constitution: The Delicate Balance, and broadcast on the Public Broadcasting System. President Carter's questioning would seem to have run counter to the command of Art. VI, cl. 3 of the Constitution that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

26/ Neff, Breaking With Tradition: A Study of the U.S. District Judge Nominating Commissions, Judicature, Dec.-Jan. 1981, at 261.

Carter Administration's circuit court nominating commissions, it was reported that:

> Both panel members and candidates reported that applicants had often been questioned about nine contemporary social issues . . . . The four areas which received the most attention were the Equal Rights Amendment, affirmative action, first amendment freedoms and defendants' rights. [27]

Other "contemporary social issues" that judicial candidates were questioned on included abortion, forced busing, economic regulation, capital punishment, and pending U.S. Supreme Court cases. [28]

---

[27] *See*, *e.g.*, Berkson and Carbon, 1 *Federal Judicial Selection During the Carter Administration* -- *The United States Circuit Judge Nominating Commission: Its Members, Procedures, and Candidates* 96-101; *See also*, Fish, *Questioning Judicial Candidates*, Judicature, June-July 1978, at 9.

[28] *Id*. In the AJS study, one panel member was quoted as saying that some of his colleagues "asked every applicant . . . if they supported ERA. It got ridiculous." Berkson and Carbon, *supra*, at 103. This study also reported that "[s]ome commissioners believed that the ideological bias of other members led them to strongly favor minorities and women. One panelist was disturbed by the 'insistence' that a 'minority member' be placed 'on the list submitted to the President.' Members of another panel were disturbed that 'the questions on the ERA was constant and pressing.' One individual believed that 'a public recorded vote by some applicants gave them an undue advantage.' Another member of that same panel, in apparent reference to interview questions about ERA, was disturbed by the 'effort to commit applicants to a certain philosophy.' A member of another panel was offended by the 'overt feminist politics of women.'" *Id*. at 163.

In a 1977 speech, a Carter Justice Department official elaborated on that Administration's judicial selection philosophy, saying that what a "judge contributes to the creation of legal doctrine depends in large measure upon his sense of values, what he believes in regard to the fundamental relationships of citizens to their government and of one person to another." He went on to suggest that "it is not the person's position on a specific question that matters; rather it is the person's overall attitude on the larger issues of life and law." This "overall attitude" was defined as "ideological factors," which could be determined by commission members through "examining the prospective nominee's speeches, writings, and actions, and by interviewing professional and personal associates." [29]

In short, the immediate prior administration considered it entirely natural and appropriate to consider a judicial candidate's views on policy issues, since that Administration apparently expected that its judges might sometimes be called upon to "create" legal doctrine according to their personal values in the context of their "adjudicating." [30] That is exactly the sort of politicization of the federal judiciary of which the Reagan Administration has been wrongly accused.

---

[29] *See* Fish, *supra*, at 13, and Berkson, *The U.S. Circuit Judge Nominating Commission: The Candidates' Perspective*, Judicature, May 1979, at 471.

[30] This is not meant to denigrate many of the very able Carter appointees on the bench today who understand their proper role in our constitutional order. What it does mean is that this understanding was not a criterion in the selection process by which they were nominated.

One vignette from the previous administration's judicial selection process aptly illustrates the sea change that has taken place in this area since January 20, 1981. I recall one confirmation hearing before this Committee where a member of your panel asked the appeals court nominee before him: "If a decision in a particular case is required by case law or statute, and yet that offended your conscience, what might you do in that situation?" The nominee answered: "I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience." The nominee went on to explain the standards with which he would replace the statutory law of the land by his conscience. I quote again from the nominee: "I was born and raised in this country, and I am steeped in its traditions, its mores, its beliefs, and its philosophies; and if I felt strongly in a situation like that, I feel it would be the product of my very being and upbringing. I would follow my conscience." This nominee was confirmed.

To this Administration's mind, for a federal judge to render decisions according to his or her conscience rather than the law is itself unconscionable. Further, I surmise that his nominee was not as steeped in the "traditions, mores, beliefs, and philosophies of this country" as he believed. For, to quote once again from Chief Justice Marshall in Marbury v. Madison: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." Under this structure so established by the people, Marshall continued, "[i]t is emphatically the province and duty of the judicial department to say what the law *is*." Marshall was one judge who did need to be reminded that "[t]he government of the United States has been emphatically termed a government of laws and not of men."

VII.

At this early date, with almost a year left in the Reagan Administration, it is premature to attempt a definitive examination of the results of the Administration's judicial selection process. Nevertheless, it is possible to take the measure of some of the available statistical characteristics of Reagan appointees to date. 31/

31/ President Reagan has thus far appointed 343 judges to Article III courts: 3 to the Supreme Court, 76 to the circuit courts of appeals, 258 to the district courts, and 6 to the Court of International Trade. In addition, the nominations of 1 Supreme Court justice, 9 circuit court judges and 18 district court judges are currently pending before the Senate.

There is no way to rate judges objectively, and the ABA is no more free of institutional biases than any other human institution. That being said, the ABA's Standing Committee on the Federal Judiciary evaluates judicial nominees according to its own standards for professional fitness for the federal bench. Under the ABA's evaluation system, nominees are given one of four ratings: "Exceptionally Well Qualified" (EWQ), "Well-Qualified" (WQ), "Qualified" (Q), or "Not Qualified" (NQ). 32/ If weighted averages of 3 for EWQ, 2 for WQ, 1 for Q, and 0 for NQ, are assigned to the ABA's ratings, President Reagan's total Article III appointments average out to 1.61, slightly higher than the previous Administration's average of 1.60. 33/

Professor Sheldon Goldman of the University of Massachusetts, one of the nation's foremost authorities on judicial selection, has made this assessment of President

---

32/ One of the common myths regarding the ABA's rating system is that an assignment of the rating of "Qualified" means "marginally qualified," or "just passing" or "barely qualified." According to the ABA, when it deems a nominee "Qualified," it certifies that in its judgment, the prospective nominee would be able "to perform satisfactorily as a federal judge with respect to competence, integrity and temperament." American Bar Association Standing Committee on the Judiciary, What it is and How it Works, at 5 (1983). As Bernard Segal, the long-time chairman of the ABA's Standing Committee on the Federal Judiciary, once put it, "Qualified" ratings "do not constitute 'borderline cases' as to competence." Chase, Federal Judges: The Appointing Process 155 (1985).

33/ President Carter's appointments are the most appropriate for comparison against those of this Administration, as his was the immediate prior Administration, and because he made a roughly similar number of appointments.

Reagan's first term appointments: "If the ABA ratings are taken as a rough measure of quality, the Reagan appointments may be seen as equaling the Carter appointees in quality, and marginally surpassing the appointments of Ford, Nixon, and Johnson." [34]

This trend has continued into President Reagan's second term. Professor Goldman again concludes that:

> [O]n balance and with few exceptions, the Reagan Administration during the second term appears thus far to have been successful in recruiting qualified individuals who share the Administration's judicial philosophy. Again, with few exceptions, appointees to both the district and appeals courts have been men and women of accomplishment, and although there are some distinctive differences in the attribute profile of the second term appointees compared to those from the first term, they generally compare favorably with the appointments of previous Administrations. [35]

Indeed, in the case of district court appointments, if the ABA ratings are taken as "as a rough measure of quality," [36] the second term appointees "can be seen as marginally surpassing the appointees of Carter, Ford, Nixon, and Johnson. Assuming that the ABA ratings are a reasonably accurate assessment of the credentials of appointees, the second term appointments, on the whole, may well turn out to be the most professionally qualified group of appointees over the last two decades." 37/

---

[34] Sheldon, Recognizing the Judiciary: The First Term Appointments, Judicature, April/May 1985, at 322.

[35] Goldman, Reagan's Second Term Judicial Appointments: the Battle at Midway, Judicature, April/May 1987, at 329.

[36] It is well-known that there has been longstanding disagreement both within and without the bar as to the significance of the ABA ratings, and whether the ABA is in fact an ideal evaluator of judicial talent. For these and other reasons there have been voices across the political spectrum questioning the ABA role in the judicial selection process. One member of this committee, for instance, has (continued...)

The ABA ratings of President Reagan's judicial appointments equal or surpass those of recent Administrations in a number of vital respects. President Reagan has appointed, in both percentage and absolute terms, more circuit court judges rated EWQ than did Presidents Carter, Ford, or Nixon. Moreover, President Reagan, unlike all other recent presidents (save for Ford, who only appointed 64 judges, less than 20% of the number appointed by this Administration to date), has never appointed a judicial candidate who received an ABA rating of NQ. Presidents

---

36/ (...continued)
said that permitting the ABA to pass on the qualifications of judges is like "Jack the Ripper determining the qualifications of surgeons in 18th century England." Slotnick, The ABA Standing Committee, id. at 350. The head of the National Bar Association has said that "Blacks have long suspected that the ABA's rating of blacks has not been fair and is used primarily as a tool for maintaining segregated courts and for keeping strong black civil rights lawyers from becoming judges." Id. There has been little question, however, that members of the ABA Committee sacrifice a considerable amount of time and effort in serving in this capacity and that their ratings of judicial candidates remain the most comprehensive ratings extant, notwithstanding this ongoing debate over the Committee's role.

37/ Goldman, Reagan's Second Term Judicial Appointments: the Battle at Midway, Judicature, April/May 1987, at 324, 329.

Carter, Nixon, Johnson, Kennedy, and Eisenhower all appointed candidates who were appraised NQ by the ABA. [38]

A further measure of the comparative quality of the Reagan judges is found in the fact that in its evaluation of the previous Administration's nominees, the ABA consistently _relaxed_ its age and experience standards in order to satisfy President Carter's oft-repeated determination to appoint specified percentages of women and minorities to the bench. A member of the ABA's Standing Committee during the Carter Administration has said:

> We were quite concerned about criteria not having been met by women and/or minorities because of the realties of professional discrimination. . . . There were a number of women and minority candidates that we found 'qualified' despite the lack of 12 years at the bar. Less experience was sufficient in some women, but not in some white males. [39]

---

[38] _Numbers of Judicial Appointees Rated "NQ":_

Reagan	- 0	of	343 to date
Carter	- 3	of	258
Ford	- 0	of	64
Nixon	- 1	of	224
Johnson	- 4	of	162
Kennedy	- 8	of	126
Eisenhower	- 11	of	187

[39] _See_ Slotnick, _The ABA Standing Committee on the Federal Judiciary: A Contemporary Assessment -- Part I_, Judicature, March 1983, at 355 and 360. Quote by Brooksley Born who later became the Chairman of the Committee.

When it was apparent that an 'affirmative action' nominee was not going to receive a rating of Q, the Chairman tells us that the Carter Administration would lobby the Standing Committee in an effort to get it to reconsider the rating:

> There have been instances, particularly on minority candidates and women, where there was much interaction with the attorney general and the White House. Much of the discussion focused on how standards should be applied, and we discussed standards in rather general terms. [40]

On the other hand, another ABA predisposition -- that against academic appointees -- has not been relaxed in its evaluation of President Reagan's circuit court nominees, which have included a large share (21%) of distinguished law professors. Legal scholars such as Antonin Scalia, Frank Easterbrook, J. Harvie Wilkinson, Richard Posner, Ralph Winter, John Noonan, Stephen Williams, Pasco Bowman, and Morris Arnold all received Q ratings when they were appointed by President Reagan to the federal courts, even through they were acknowledged to represent the intellectual elite of their profession. If these judges had received ratings that reflected their real standing in the legal profession, each would have received a rating of least WQ.

---

[40] Id.

The ABA's willingness to relax its standards in the case of affirmative action judicial candidates, and its predisposition against legal scholars, came to public attention during the confirmation of Judge J. Harvie Wilkinson. ABA Committee member Stewart Dunnings explained his minority vote of "Not Qualified" for Wilkinson:

> Also his admission to the bar did not comply with our rules, where we have announced that they should have at least 12 years. Now, we in the past, of course, have waived that, when you have an affirmative action candidate -- and certainly he did not fall within that category. 41/

If the ABA had not relaxed its standards in evaluating Carter's "affirmative action" appointments, and if the legal scholars in the ranks of the Reagan appointees had been rated according to their true standing in the legal profession, a greater disparity between the average overall ratings for Carter and Reagan appointments would be seen, rather than an approximate parity.

As with overall assigned ABA ratings, the age statistics for this Administration's appointees do not appreciably differ from those of the Carter Administration or its predecessors. The average age, upon appointment, of the Reagan appointees is 49.2.

41/ Hearings Before the Senate Judiciary Committee, 98th Cong., 2d Sess. No. 98-372, Part 3, at 352 (1984).

The average age, upon appointment, of the Carter appointees was 50.4. 42/ This difference of about one year is negligible in light of the number of judges appointed.

Other statistical indicators reveal favorable comparisons between Reagan judicial appointees and those of earlier administrations. Through the end of the 99th Congress, for example, 77% of President Reagan's appointees had prior experience as a judge or prosecutor, the highest percentage for all administrations back to Lyndon Johnson's. 43/ As Professor Goldman writes:

> If we consider previous judicial or prosecutorial experience significant preparation for a federal district judgeship, then the second term Reagan appointees were the best prepared group of appointees of all administrations surveyed. 44/

In sum, by every available statistical indicator of quality,

42/ Office of Legal Policy, Myths and Realities -- Reagan Administration Judicial Selection, December 29, 1987, at 7. Similarly, the average age at appointment of Ford appointees was 49.7, of Nixon appointees, 50.0, and Johnson appointees 51.6. See Goldman, Reagan's Second Term Judicial Appointments: The Battle at Midway, Judicature, April-May 1987, at 321 (Tables 1 and 3).

43/ Id. at 328.

44/ Id.

the Reagan Administration's judicial appointees compare quite favorably with those of all other administrations. [45]

VIII

Ultimately, any telling difference between some past judicial appointees and those of the Reagan Administration will be reflected in their performance on the bench. None of us, of course, can predict that future. What we in the Reagan Administration hope and expect is that this Administration's appointees will conduct themselves with the understanding that Article III judicial power and the guarantee of life tenure is not a license to impose a judge's conscience on the citizenry. Thus, we hope that our appointees will apply the applicable law, whether the results in policy terms are consistent with conservative or liberal policy goals or preferences. The "early returns" of the performance of our nominees give us no reason to be disappointed with our efforts.

---

[45] The quality of Reagan appointees is symbolized by President Reagan's choices for the Supreme Court, who are emblematic of this Administration's abiding commitment to excellence. In Justice O'Connor, our country has a jurist with extensive public service as a prosecutor, a private practitioner, a state legislator, and a judge of the Arizona appellate court. Justice Scalia, a thoughtful individual of truly impressive scholarship, brings to the Court a varied background of government service and academic and judicial experience. Few modern Chief Justices have come to that office with the stature and experience of William Rehnquist. He served on the Supreme Court with great distinction for over a decade before his elevation. He has proven himself as a model of judicial scholarship and craftsmanship. Judge Anthony Kennedy's record of long experience as a private practitioner and educator, and his distinguished service as a judge of the United States Court of Appeals for the Ninth Circuit, augur well for his service to the Nation on the Court.

Three First Amendment decisions by well-known Reagan appointees reflect this understanding that the judge's role is to apply the law as it is, whatever the results may be in policy terms. In Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), Judge Robert Bork authored a panel opinion upholding a District of Columbia statute barring demonstrations within 500 feet of foreign embassies. The law was challenged by Young Conservative Alliance members who wished to demonstrate in front of the Soviet and Nicaraguan embassies. Judge Bork reasoned that under applicable Supreme Court precedents, the statute passed First Amendment muster because it was neither unconstitutionally vague nor unconstitutionally overbroad, and no less-restrictive alternative existed to meet the requirements of security.

In American Booksellers Association v. Hudnut, 771 F.2d 323 (7th Cir. 1985), Judge Frank Easterbrook similarly eschewed conservative policy goals in the face of what he believed to be the Constitution's requirements with a panel opinion holding unconstitutional an Indianapolis anti-pornography ordinance that proscribed the portrayal of the "graphic sexually explicit subordination of women, whether in pictures or words." Judge Easterbrook reasoned that under the ordinance, "[s]peech treating women in the approved way -- in sexual encounters 'premised on equality' -- is lawful no matter how sexually explicit. Speech treating women in the disapproved way -- as submissive in matters sexual or as enjoying humiliation -- is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." Id. at 325. Although pornography is a national problem and is properly the object of local efforts at regulation, such efforts must comport with the Constitution. Judge Easterbrook's opinion held that the state's strong interest in combatting pornography did not permit it to regulate the content of speech in this manner.

In Lebron v. Washington Metropolitan Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984), a panel composed of judges appointed by this Administration unanimously held that the WMATA could not refuse to accept a poster critical of the Reagan Administration for display in its subway stations because of its content when the WMATA had made its stations public forums by accepting other politically charged advertisements. The court declared: "Subject to a limited number of exceptions -- most notably, reasonable time, place and manner regulations -- political speech may not constitutionally be restricted in a public forum." Id. at 896.

Such principled decisions by this Administration's appointees upholding the rule of law while incidently rejecting conservative policy positions have prompted some commentators in the media to suggest that the Administration's judicial selection process has "come up short" and led to the "undermining of Reaganism", because the "President's judges were supposed to advance a right-wing agenda -- but instead, they often stymied conservatives." 46/ Of course, that's just the point. Judges aren't "supposed to" advance any sort of personal ideological agenda, and President Reagan did not appoint his judges with any such policy agenda in mind. Instead, the task of judges is limited to applying the law as it is given to them by the Constitution and other laws of the United States. While we welcome the recognition that our appointees are unwilling to countenance a result-oriented jurisprudence, we take issue with the conclusion such commentators have drawn from those facts. We believe that it is the triumph of the President's judicial philosophy when we see such evidence that his appointees are apparently opting for the rule of law as they find it in the Constitution and statutes, rather than personal or sociological feelings of "right and wrong." Where statutes are drawn by politically conservative legislative bodies, judicial interpretations will likely result in conservative public

---

46/ See, e.g, Reagan's Court Revolution Comes Up Short, U.S. News and World Report, February 2, 1987, at 10. See also, Are Reagan's New Judges Really Closet Moderates?, The Washington Post, August 9, 1987, at C1.

policies; where statutes are drawn, however, by politically liberal legislative bodies, judicial interpretations will likely result in politically liberal public policies.

We in the Reagan Administration have worked hard to achieve this success. I believe that President Reagan has paid as much attention to his judicial appointing responsibilities under Article II, Sec. 2, of the Constitution, as any President in history. That commitment has made, and will continue to make, a real difference in the way our constitutional system works. Not only have this Administration's nominees refrained from abusing their Constitutional warrant under Article III in order to impose a conservative political agenda not mandated by law, they have resisted the illegitimate temptation to oversee or administer other institutions of the government. As Professor A.E. Howard of the University of Virginia Law School has said, "You won't see Reagan's appointees taking over school systems, jails, and ordering forced busing." 47/

47/ I might add also that this Administration's appointees don't appear, in the words of the President, to "act like a bunch of sociology majors" when it comes to imposing sentences on convicted criminals. Figures from the Administrative Office of U.S. Courts reveal that since President Reagan began appointing judges in 1981, criminal defendants convicted in federal district courts are more likely to be sentenced to prison, as well as receive longer sentences, than was the case in 1980. Between 1980 and 1984, the average federal prison sentence per conviction rose 64 percent for homicide offenses, 117 percent in rape cases, 23 percent in drug cases, and 22 percent for all federal crimes. While these figures do not distinguish between Reagan-appointed judges and those appointed by other Presidents, and while such

(continued...)

In closing, I would like to thank the chairman and members of the Committee for the opportunity to come before you and explain the Reagan Administration's judicial philosophy and its judicial selection process. We are proud of the calibre of individuals appointed as judges under the aegis of our Administration. We in the Administration look forward to cooperating with you on these matters over the next year, and very much appreciate and will reciprocate the good faith shown by the Chairman in his pledge to keep the judicial appointment process open during the full term of this President.

The judicial selection process under the United States Constitution, involving an intersection between the responsibilities of the executive and the legislative branches, is one that offers the potential for great friction between these co-equal branches of the national government. This is especially true when important difference exist between the judicial philosophies of the President and some Members of the Congress. We recognize that potential and pledge to work as closely as possible with the Chairman, the nominations task force Chairman, Senator Leahy, and with other members of the Committee, to ensure that this process continues to proceed in a positive and constructive manner.

47/ (...continued)
figures do need to be approached with caution, they do suggest the tenor in which President Reagan's appointees have approached their criminal sentencing responsibilities.

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

21 JAN 1988

The Honorable Joseph R. Biden
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Mr. Chairman:

I am pleased to enclose the answers to the written questions submitted in connection with the February 2 hearing in which Assistant Attorney General Markman will testify.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure

QUESTIONS FOR ASSISTANT ATTORNEY GENERAL STEPHEN J. MARKMAN

1. For the period from January 20, 1981 through December 31, 1987, please supply the following information:

a) The total number of nominations by President Reagan to the federal courts, and the subtotals for each federal district court, each federal court of appeals, and for the Supreme Court; and

President Reagan has nominated 380 judges to the federal courts, 343 of whom were ultimately confirmed by the Senate. The 380 can be broken down as follows:

Supreme Court -- 5 (3 confirmed, 1 pending at close of 100th Congress, 1st session).

Circuit Courts -- 87 (76 confirmed, 9 pending at close of 100th Congress, 1st session).

1st Circuit -- 2
2nd Circuit -- 8
3rd Circuit -- 7
4th Circuit -- 4
5th Circuit -- 8
6th Circuit -- 9
7th Circuit -- 8
8th Circuit -- 6
9th Circuit -- 11
10th Circuit -- 6
11th Circuit -- 2
D.C. Circuit -- 9
Fed. Circuit -- 7

District Courts -- 282 (258 confirmed, 19 pending at close of 100th Congress, 1st session).

District of Alaska -- 2
Middle District of Alabama -- 1
Northern District of Alabama -- 1
Southern District of Alabama -- 3
Eastern District of Arkansas -- 1
Western District of Arkansas -- 2
District of Arizona -- 4
Central District of California -- 15
Eastern District of California -- 2
Northern District of California -- 5
Southern District of California -- 3
District of Connecticut -- 2
District of Colorado -- 3
District of D.C. -- 6
District of Delaware -- 3
Middle District of Florida -- 4
Northern District of Florida -- 2

Southern District of Florida -- 5
Middle District of Georgia -- 1
Northern District of Georgia -- 2
District of Hawaii -- 4
Northern District of Iowa -- 1
Southern District of Iowa -- 1
District of Idaho -- 1
Central District of Illinois -- 2
Northern District of Illinois -- 12
Southern District of Illinois -- 1
Northern District of Indiana -- 5
Southern District of Indiana -- 3
District of Kansas -- 1
Eastern District of Kentucky -- 1
Western District of Kentucky -- 2
Eastern District of Louisiana -- 4
Western District of Louisiana -- 3
District of Massachusetts -- 4
District of Maryland -- 5
District of Maine -- 2
Eastern District of Michigan -- 7
Western District of Michigan -- 1
District of Minnesota -- 3
Eastern District of Missouri -- 1
Eastern and Western Districts of Missouri -- 2
Western District of Missouri -- 4
Northern District of Mississippi -- 2
Southern District of Mississippi -- 4
District of Montana -- 1
District of Nebraska -- 2
District of New Jersey -- 8
District of New Mexico -- 3
District of Nevada -- 4
Eastern District of New York -- 9
Northern District of New York -- 3
Southern District of New York -- 11
Western District of New York -- 3
Eastern District of North Carolina -- 3
Middle District of North Carolina -- 1
Western District of North Carolina -- 3
District of North Dakota -- 2
Northern District of Ohio -- 6
Southern District of Ohio -- 3
Northern, Eastern, and Western Districts of Oklahoma -- 1
Western District of Oklahoma -- 2
District of Oregon -- 2
Eastern District of Pennsylvania -- 9
Middle District of Pennsylvania -- 2
Western District of Pennsylvania -- 3
District of Puerto Rico -- 4
District of Rhode Island -- 3
District of South Carolina -- 4

District of South Dakota -- 2
Eastern District of Tennessee -- 6
Middle District of Tennessee - 1
Western District of Tennessee -- 3
Eastern District of Texas -- 3
Northern District of Texas -- 4
Southern District of Texas -- 5
Western District of Texas -- 3
District of Utah -- 2
Eastern District of Virginia -- 5
Western District of Virginia -- 1
District of Virgin Islands -- 1
District of Vermont -- 1
Eastern District of Washington -- 1
Western District of Washington -- 4
Eastern District of Wisconsin -- 2
Western District of Wisconsin -- 1
Southern District of West Virginia -- 1
District of Wyoming -- 1

President Reagan has also appointed six judges to the Court of International Trade.

b) The total number of women and the total number of racial minorities nominated by President Reagan to the federal courts, and the subtotals for each federal district court, each federal court of appeals, and for the Supreme Court.

President Reagan has nominated and appointed 29 women and 20 racial minorities to the federal courts. In addition, the nominations of 2 women and 2 racial minorities are currently before the Senate.

Supreme Court -- 1 woman

Circuit Courts -- 7 women, 2 racial minorities

1st Circuit -- 1 racial minority
2nd Circuit -- 1 racial minority
3rd Circuit -- 1 woman
5th Circuit -- 1 woman
9th Circuit -- 1 woman
10th Circuit -- 1 woman
Fed. Circuit -- 3 women

District Courts 22 women, 20 racial minorities

Central District of California -- 3 women
2 racial minorities
Eastern District of California -- 1 racial minority
District of Delaware -- 1 woman

Middle District of Florida -- 2 women
Southern District of Florida -- 1 woman
1 racial minority
District of Hawaii -- 1 racial minority
Northern District of Illinois -- 3 women, one of whom is a racial minority
Northern District of Indiana -- 1 racial minority
Southern District of Indiana -- 1 woman
District of Maryland -- 1 racial minority
Eastern District of Michigan -- 1 woman
1 racial minority
Southern District of Mississippi -- 1 racial minority
District of New Jersey -- 1 woman
1 racial minority
Eastern District of New York -- 1 woman
Southern District of New York -- 2 women
Northern District of Ohio -- 1 woman
Western District of Pennsylvania -- 1 woman
District of Puerto Rico -- 4 racial minorities
District of Rhode Island -- 1 racial minority
District of South Carolina -- 1 woman
Western District of Tennessee -- 1 woman
Southern District of Texas -- 2 racial minorities
Western District of Texas -- 1 racial minority
Eastern District of Virginia -- 1 racial minority
Western District of Washington -- 1 woman
Southern District of West Virginia -- 1 woman

President Reagan has also appointed one woman to the Court of International Trade.

2. Please describe in detail the process by which the Administration selects nominees for:

a) The federal courts of appeals; and

For the federal courts of appeals, the Administration considers candidates within a particular state or region who come to its attention from a wide variety of sources, such as members of Congress, civic leaders, public officials, and state and local bar officials. Lower federal courts also provide a rich source of candidates for the courts of appeals. It is, however, impossible to categorize every potential pool of court of appeals candidates. To state just a few other sources, the Administration has considered law professors, private practitioners, and candidates recommended by officials in various bar associations and other organizations within the legal community. This is consistent with what previous Administrations have done. Candidates are generally interviewed by officials in the Department of Justice. The results of these interviews are considered in conjunction with a candidate's background and reputation before the Attorney General makes any recommendation to the White House. After the White House Judicial Selection Committee considers the Attorney General's recommendation, FBI and ABA investigations of the prospective nominee commence. During this time, the prospective nominee's tax records are checked and he is asked to fill out financial disclosure and medical disclosure forms. Based on all of this, the President, with advice from the Attorney General and the Counsel to the President, decides whether to nominate an individual.

b) The federal district courts.

For the federal district courts, the selection process is the same as that for court of appeals positions but the pool of potential candidates is much smaller. As have past Administrations, this Administration makes it a policy generally to consider only those candidates recommended by senators of the President's party for district court openings that arise in states with at least one Republican senator. In states without a Republican senator, we normally look to the Republican congressional delegation to recommend candidates, as have past Administrations. Whether a senator or congressman is recommending candidates, this Administration has a policy of requesting at least three names, as set out in the March 1981 memorandum from Attorney General Smith, a copy of which is attached. Otherwise, the process is the same as that describe in 2(a) above.

3. Please describe in detail the process by which the Administration selects nominees for:

a) The United States Court of Appeals for the District of Columbia.

b) The United States District Court for the District of Columbia.

The selection process for both the United States Court of Appeals for the D.C. Circuit and the United States District Court for the District of Columbia is similar to the selection process noted above for the courts of appeals except the search for candidates is not limited to any one state or region. The federal courts in the District of Columbia are national courts that deal with issues of national concern, and this Administration, like previous Administrations, does not believe it proper to select judges only from the District of Columbia to serve on those courts.

4. Please describe all measures used by the Administration to find and nominate women and racial minorities to the federal courts of appeals and the federal district courts.

In this Administration's view, one's race or gender does not make one either more or less suited to sit in judgment over fellow citizens according to law. Because more traditional legal organizations are sometimes thought to be less open to, or less attractive to, certain groups, we have consistently maintained an open door for all such groups and have invited them to recommend candidates who had the requisite qualifications at any time, Indeed, on some occasions in the past, when it was thought that their input would be helpful, this Administration has itself contacted associations that predominantly serve such groups. We, of course, consider women and minorities who are recommended by Republican senators or congressmen or who come to our attention during the normal process described above. In addition, we encourage senators to cast their nets as widely as possible in order to ensure that no qualified candidate is overlooked. We emphasize that this is not because race or gender is entitled to representation, but because the broadest possible field of candidates serves the public interest by allowing a more inclusive search for the very best quality in our judges.

5. Please describe all measures used by the Administration to find and nominate women and racial minorities to the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia.

The answer to this question is the same as the answer to Question #4 except that we look nationally for candidates and every senator and congressman may make recommendations.

6. Please state the number of instances, if any, in which this Administration has approached a woman or a member of a racial minority regarding potential nomination of such person to either the United States Court of Appeals for the District of Columbia Circuit or the United States District Court for the District of Columbia, and state the outcome of each such instance.

Records of judicial candidates who were not selected are very incomplete. Even those that are available have not been classified by this Administration according to race or sex.

7. Please identify any bar associations and other organizations consulted by the Administration in seeking to identify women and racial minorities to nominate to the federal courts of appeals and the federal district courts, state the frequency with which each such association or organization has been consulted, and state the frequency with which persons identified by such association or organization have been nominated by President Reagan to the federal courts of appeals and the federal district courts.

Except when a senator recommends a district court candidate, this Administration does not track the source of recommendations of judicial candidates. See answers to questions 2, 4, and 6 above concerning the various sources of candidates.

8. Please state the number of instances, if any, in which this Administration has asked a senator to recommend a woman or a member of a racial minority for nomination to a federal court of appeals or a federal district court, and state the outcome of each such instance.

This Administration asks senators to recommend the best qualified people in their home states after an exhaustive search in which the senator is encouraged to consider applicants who have chosen both traditional and non-traditional legal careers. We believe that the broadest field of candidates possible is necessary to ensure that only the most qualified individuals in America are appointed to judgeships by President Reagan. If any one or all of the individuals that a senator recommends happen to be women or racial minorities, it is irrelevant to our selection process. All people are given equal consideration. A senator is never asked, however, to recommend a woman or minority to a federal court simply for the sake of recommending a woman or minority.

9. Please state the number of instances, if any, in which a senator has recommended a woman or a member of a racial minority for nomination to a federal court of appeals or a federal district court, and state the outcome of each such instance.

See answer to question 6.

10. This Administration has nominated far fewer women and racial minorities to the federal bench, on a percentage basis, than did the previous Administration. To what do you attribute this decline in the percentage of women and racial minorities nominated?

This Administration has always been and remains committed to appointing the best qualified individuals to the federal bench from among those persons who are available, eligible, and confirmable. Race and gender are total irrelevancies in this regard. While it is true that the percentages of nominees who were women or members of minority groups were higher under the prior Administration, that was a result of their having explicitly made race and gender criteria in the judicial selection process, thereby breaking faith with the American creed that individuals are to be judged on their own merit and not on the basis of skin color, gender or other irrelevant matters. This Administration rejects such racial and gender criteria absolutely. Our record in this area is comparable with the records of earlier predecessors.

Office of the Attorney General
Washington, D.C. 20530

MEMORANDUM

JUDICIAL SELECTION PROCEDURES

In the process of judicial selection, the Department of Justice will work closely and cooperatively with the Senate leadership, the Judiciary Committee Chairman and individual members. Both the Attorney General, on behalf of the President, and the Senate leadership are firmly committed to the principle that federal judges should be chosen on the basis of merit and quality.

By virtue of the Senators' familiarity with the members of the Bar in their respective States, the Attorney General, in making recommendations to the President for judicial appointments, will invite Republican members to identify prospective candidates for federal district judgeships. Senators are strongly encouraged to submit the names of several candidates, preferably from three to five names, to the Attorney General for a particular vacancy. This information should be shared at the earliest practicable time with the Attorney General's designated representative so that any questions or reservations as to merit or appropriateness of the proposed candidates can be identified sufficiently early to allow meaningful consultation.

Members are encouraged to utilize screening mechanisms to ensure that highly qualified candidates are identified and recommended. Those mechanisms include, but of course are not limited to, advisory groups or commissions charged with the responsibility of assisting in the evaluation and selection of highly capable and experienced candidates. The Attorney General may, when appropriate, make recommendations to Senators with regard to specific judicial candidates.

With respect to States with no Senators from the majority party, the Attorney General will solicit suggestions and recommendations from the Republican members of the Congressional delegation, who will act in such instances as a group, in lieu of Senate members from their respective States. It is presumed that Congressional members in such cases would consult with the Democratic Senators from their respective States.

The Attorney General also desires to receive suggestions with respect to Court of Appeals nominations to be made by the President. The precise means by which such candidates for appointment will be identified by the Department are currently being formulated, but the President's mechanism for judicial selection at the Circuit Court level will include provisions for receiving the recommendations of members of the Senate (or of the appropriate Congressional delegation, in the case of a State with no Republican Senator.)

Senator **Kennedy**. Our next panel are three distinguished witnesses: Judge Judith Chirlin, Estelle Rogers, and Thomas Duckenfield.

Judith Chirlin of California Superior Court is testifying on behalf of the National Association of Women Judges. She is a graduate of George Washington University, University of Southern California Law School. Judge Chirlin has served the Superior Court for Los Angeles County for two-and-a-half years. She is chair of the Association's Judicial Selection and Appointments Committee. She flew in from California just to testify today. We are most pleased that she could be with us.

Estelle Rogers is the National Director of the Federation of Women Lawyers, Judicial Screening Committee. We are most eager to hear her testimony.

Thomas Duckenfield is testifying on behalf of the National Bar Association, of which he is vice president. Mr. Duckenfield is vice president of Washington Gas Company here. We appreciate your taking the time to be with us today.

We will start off with you, Judge Chirlin.

STATEMENT OF PANEL CONSISTING OF HON. JUDITH C. CHIRLIN, NATIONAL ASSOCIATION OF WOMEN JUDGES; ESTELLE H. ROGERS, NATIONAL DIRECTOR, FEDERATION OF WOMEN LAWYERS, JUDICIAL SCREENING PANEL; AND THOMAS DUCKENFIELD, VICE PRESIDENT, NATIONAL BAR ASSOCIATION

Judge **Chirlin**. Thank you, Senator.

The National Association of Women Judges appreciates your invitation to address this committee on a subject of such critical importance not only to our members, but to the fairness of the justice system and to the perception in communities across the country that our courts are fair and representative of all citizens.

NAWJ is composed of approximately 800 judges, mostly women, of State and Federal courts of all levels. I am the Chair of the Judicial Appointments Committee. I hasten to point out that I am also a Republican, having been appointed to the Superior Court in Los Angeles by Governor Deukmejian. We call him our Governor Duke. He is, as you know, a Republican.

Senator **Kennedy**. As long as he does not get into our primaries.

Judge **Chirlin**. We applaud the committee's interest in the subject of minority appointments to the Federal bench because, as you know, in order for our courts to fulfill their time-honored role as protectors of the Constitution, they must not only interpret and apply the law correctly, but they must do it in a fashion that projects the appearance of fairness, equality and justice.

The record of the appointment of women judges to the Federal courts over the past 7 years is lamentable. I will not repeat the statistics. You have got them on the charts. I just point out, as your chart to the immediate right shows, that the decrease in the number of women judges and the percentages of women judges comes at a time when the demographics of the legal profession suggest that the percentages should be going up and not down.

I should also comment as an aside that, while I speak with reference only to women, I believe that everything I say applies equally to racial and ethnic minorities as well.

I should point out that this is not a partisan issue, nor is it a matter of judicial philosophy. Women come in all sizes, shapes, colors, of different parties, and of different political and judicial philosophies, just like men. Nor is this a matter of our asking Senators to propose, the President to appoint, or the Senate to confirm unqualified candidates just because they happen to be women. In fact, I think it is insulting to any minority group to assume or suggest that in order to appoint members of that group, you must sacrifice quality standards.

In point of fact, there are women of all political parties and judicial philosophies around the country who are exceptionally well qualified for appointment to the Federal bench.

Why is the recent record so poor? First, we have an administration that articulates a valid gender-neutral policy—that is, that they will evaluate candidates without regard to sex or ethnicity—but applies that policy in an atmosphere where their record on the appointment of women judges and public comments of some present and former members of the administration creates a perception within the women's legal community that they are not interested in appointing women judges. Women are not motivated or encouraged to apply, and the record gets worse.

Second, individual Senators, in recommending candidates to the President, are content to draw judicial candidates from the legal and political "old boys' networks" within their States from which women traditionally and historically have been excluded.

Third, the Senate Judiciary Committee has, to my knowledge, at least, declined to use its power in giving advice and consent to say to a recalcitrant administration that we are not going to confirm judicial candidates until we start seeing more women's names.

What needs to be done? The President and the Members of the Senate must take the responsibility to make sure that women know that they sincerely want to appoint qualified women to the bench. Where there is an atmosphere where qualified women are motivated to apply because they understand the President and Senators genuinely are interested in appointing them, where they know that the President and Senators do not assume that because of a woman's anatomy she embraces certain political or judicial philosophies, and where they know that the President and Senators will not assume that because she is not "one of the boys" she is not capable of doing quality judicial work—then you will get qualified women to apply in appreciable numbers.

Then and only then, if you apply gender-neutral standards in evaluating candidates, will there be an acceptable record in appointing women judges. Is there proof of that? Absolutely. All you have to do is look to my State.

On the Federal level, President Reagan has appointed three women to the District Court in the Central District and one woman to the Ninth Circuit. Why? Because Senator Wilson's recruitment and screening committee has let it be known that the Senator is genuinely interested in proposing the names of qualified women to the President.

Right now, one of—we hope—the leading candidates for an opening on the U.S. District Court in the Northern District is a woman who applied because Senator Wilson's people contacted the National Association of Women Judges and California Women Lawyers association to seek our help in identifying a qualified woman who would meet his criteria.

On the State level, the experience is even more interesting and instructive. When George Deukmejian, a Republican, became Governor, the women lawyers of our State expected little and our expectations were met. After the first year in office, only 8 of the Governor's 88 appointments went to women. On behalf of California Women Lawyers, I spoke with the Governor's appointment secretary, Marvin Baxter, regularly. He repeatedly told me in response to my comments about the small number of women appointments that there were very few female applicants.

CWL canvassed the State. I personally spoke individually with over 75 women, and we came to the conclusion that while many women were interested in judicial careers, there was a widespread perception within the women's legal community that the Governor just was not interested in appointing women.

After we discussed that conclusion with his staff, the Governor asked our help in combatting that perception. We arranged for Mr. Baxter to be invited to speak before various local women's bar groups. To date, he and I have done what has become known informally around the State as "The Marv and Judy Show" before 20 or so different local women's and other minority or local Bar Associations. At those programs, we explain the process and the politics of getting a judicial appointment, and encourage qualified candidates to apply.

The result has been a dramatic increase in the number of women applicants and then, because the Governor truly applies a gender-neutral standard in evaluating all candidates, there has been a dramatic increase in the number of women appointed.

From 1983 and 1984, when the numbers were 8 and 7, respectively, the figures have shot up to 23, 20, and 23, again, for 1985, 1986, and 1987.

But there are other numbers that are even more significant. Through January 27, of this year, Governor Deukmejian has appointed 559 judges. Of the total pool of male applicants, of 2,154 applicants, 478 have been appointed. That is 22 percent of the total pool of male applicants.

With respect to women, there have been 352 female applicants and 81 have been appointed. That is 23 percent of that pool.

Of the Caucasian applicants, 22 percent of the pool have been appointed. Of Hispanic applicants, 27 percent of the pool have been appointed. Of black applicants, 20 percent of the pool have been appointed, and of Asian applicants, 32 percent of the pool of applicants have been appointed.

Those figures show that when you create an atmosphere where people know that they will be fairly and equitably treated, and you evaluate them using the same quality standards for all candidates, without regard to irrelevant criteria such as race or sex, the appointments will come in all shapes, sizes, and colors, and will result in a strong and heterogeneous judiciary.

We urge the administration, and individual Senators, to seek out and encourage qualified women to apply, to fairly evaluate them, and to appoint them. We urge this committee to use its power of confirmation to assure that a fair and representative number of the judges confirmed are women and minorities.

We, at the National Association of Women Judges, and the women's bar groups in every State with which we work, stand ready to help the President, any individual Senator, and this committee, in the quest to bring fairness and equity to the appointment of Federal judges.

Senator **Kennedy**. Thank you very much for your very helpful and positive testimony. We will go to Ms. Rogers.

[Prepared statement of Judge Chirlin, and response to questions follows:]

TESTIMONY OF JUDITH C. CHIRLIN
BEFORE
SENATE JUDICIARY COMMITTEE
FEBRUARY 2, 1988

Thank you, Senator

The NAWJ appreciates your invitation to address this committee on a subject of such critical importance to our members, to the fairness of our justice system and to the perception in communities across the land that our courts are fair and representative of all of our citizens.

The NAWJ is composed of approximately 800 judges (mostly women) of state and federal courts of all levels. I am Chair of Judicial Appointments Committee. I am also a Republican, appointed to the Los Angeles County Superior Court by Governor George Deukmejian, a Republican.

We applaud the committee's interest in the subject of minority appointments to the federal bench, because - as we all know - in order for our courts to fulfill their time honored role as protectors of the constitution and the rights and responsibilities guaranteed therein, they must not only interpret and apply the law correctly, but they must do it in a fashion that projects the appearance of fairness, equality and justice.

The record of appointment of women judges to the federal courts over the past 7 years is lamentable. Only 8.4% of the appointees to the U.S. District Courts have been women - and in the last year that percentage has dropped to 5.4%. That is as compared to 15.5% for the Carter Administration - and comes at a time when the demographics of the legal profession suggest that the percentages should be going up - not down. (I should comment that while I speak with reference only to women, everything I say applies equally to racial and ethnic minorities as well).

I should point out also that this is not a partisan issue, nor is it a matter of judicial philosophy. Women come in all sizes, shapes and colors; of different parties and different political and judicial philosophies - just like men.

Nor is this a matter of our asking Senators to propose, the President to appoint, or the Senate to confirm unqualified candidates - just because they happen to be women. (In fact I think it is insulting to any minority group to suggest that in order to appoint members of their group, you must sacrifice quality standards.)

In point of fact there are women of all political parties and judicial philosophies around the country who are exceptionally well qualified for appointment to the federal bench.

So why is the recent record so poor?

First, we have an administration that articulates a valid gender-neutral policy (that is, that they will evaluate candidates without regard to their sex or ethnicity) but

The State Courts and the Federal Courts differ in many ways, including size, jurisdiction, and the manner in which judges are selected and removed.

Federal courts are courts of limited jurisdiction. They have power to hear cases only of certain types. Those cases fall generally into two categories: cases between citizens of 2 different states (we call those "Diversity of Citizenship cases) where there is more than $10,000 at stake, and cases where some question of federal law is in dispute.

The State Courts are courts of unlimited jurisdiction - they have the power to hear all cases relating to state laws and most of those of federal law as well. Because 90% or more of the law that affects any individual's life on a daily basis is state law, the state courts are much more of an influence in day to day life.

Also, the State Courts must be prepared top deal with many, many more cases than the federal courts, so they are much larger. Thus, nationwide, in the federal courts there are 5___ District (or trial) Courts. Countrywide, there are approximately 12,000 trial court judges in state courts. California alone has over 1,000 trial court judges. It is important to keep in mind that each of the state court systems is separate from all of the others. Note that when introducing the subject, I said we have a dual court structure - not 2 court systems. In actuality, if you count count court systems, we have 52 - the first is the Federal

Where they know that the President and Senators will not assume that because she's not "one of the boys" she's not capable of doing quality judicial work;

Then will you get qualified women to apply in any appreciable numbers and then, and only then, if you apply gender neutral standards in evaluating candidates, will there be an acceptable record in appointing women judges.

Is there proof of this?

Let's look at California -- On the federal level, President Reagan has appointed 3 women to the District Court - Central District and one woman to the 9th Circuit.

Why?

Because Senator Wilson's recruitment/screening committee has let it be known that the Senator is genuinely interested in proposing the names of qualified women to the President.

Right now, one of the (we hope) leading candidates for an opening on the District Court - Northern District is a woman who applied because Senator Wilson's people contacted NAWJ and California Women Lawyers to seek our help in identifying a qualified woman who would meet his criteria.

And on the State level, the experience is even more interesting and instructive. When George Deukmejian - a Republican - became Governor, the women lawyers of our state expected little and our expectations were met. After the first year in office, only 8 of the Governor's 85 appointments went to women.

On behalf of California Women Lawyers, I spoke with the Governor's Appointments Secretary, Marvin Baxter, regularly. He repeatedly told me - in response to my comments about the small number of women appointees - that there were very few female applicants.

CWL canvassed the state - I personally spoke individually to over 75 women - and we came to the conclusion that while many women were interested in judicial careers, there was a widespread perception within the women's legal community that the Governor wasn't interested in appointing women. After we discussed that conclusion with his staff, the governor asked our help in combatting that perception.

We arranged for Mr. Baxter to be invited to speak before various local women's bar groups - to date, he and I have done what has become known informally around the State as the "Marv and Judy Show" before some 20 or so women's and other minority or local bar groups. At those programs we explain the process and the politics of getting a judgships - and encourage qualified candidates to apply.

The result has been a dramatic increase in the number of women applicants, and then - because the Governor truly applies gender neutral standards in evaluating all candidates - there has been a dramatic increase in the number of women appointed. From 1983 and 1984, when the numbers were 8 and 7 respectively, the figures have shot up to 23, 20 and 23 for 1985, 86 and 87, or a total of 81 women appointed.

But there are other numbers that are more significant:

Thru January 27 of this year, Governor Deukmejian has appointed 559 judges:

Of the total pool of male applicants of 2154, 478 have been appointed - 22% of the pool.

Of 352 female applicants, 81 have been appointed - 23% of the pool.

Of 2270 caucasian applicants, 498 (or 22% of the pool) have been appointed.

Of 96 hispanic applicants, 26 (27% of the pool) have been appointed

Of 83 black applicants, 17 (or 20% of the pool) have been appointed.

Of 57 asian applicants, 18 (or 32% of the pool) have been appointed.

These figures show that when you create an atmosphere where all people know that they will be fairly and equitably treated, and then you evaluate them using the same quality standards for all candidates - without regard to irrelevant criteria such as race or sex - the appointments will come in all shapes, sizes and colors and will result in a strong and heterogenius judiciary.

We urge the administration and individual Senators to seek out and encourage qualified women to apply, to fairly evaluate them, and to appoint them.

We urge this committee to use its power of confirmation to assure that a fair and representative number of the judges confirmed are women and minorities.

We, at NAWJ, and the women's bar groups in every state with which we work stand ready to help the President, any individual Senator and this committee in the quest to bring fairness and equity to the appointment of federal judges.

JCC:sk

CRIMINAL DIVISION
The Superior Court
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
JUDITH C. CHIRLIN
JUDGE

CRIMINAL COURTS BUILDING
210 WEST TEMPLE STREET
(213) 974-1234

February 16, 1988

Senator Joseph R. Biden, Jr.
Chairman,
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden;

Thank you for the opportunity to address your committee on the subject of the appointment of women and minority judges.

In accordance with your request, I submit herewith the answers to Senator Grassley's questions, although I might point out that most of the questions were answered during the hearing.

QUESTION:

#1a) I have never been one to place much weight in the A.B.A's rating of judges -- particularly for the Supreme Court, where this Judiciary Committee will conduct its own exhaustive investigation.

But let me ask this: How many Carter Administration District Court nominees were considered "not qualified" by the A.B.A. Standing Committee?

ANSWER:

I do not know.

QUESTION:

#1b) Has President Reagan ever appointed a judge found "not qualified by the A.B.A.?

ANSWER:

I do not know.

QUESTION:

#1c) Would you agree that the A.B.A. is a relatively objective source for evaluating judicial candidates?

ANSWER:

Yes.

QUESTION:

#1d) A.B.A. President William Falsgraf was quoted as stating the following in 1986:

> "Ideology is always a factor for a President. Putting that aside, the Reagan Appointments have been of the highest caliber." [quote from U.S.News and World Report, June 30, 1986.]

Is Mr. Falsgraf mistaken in his assessment of the Reagan Administration appointees?

ANSWER:

No. With notable exceptions, President Reagan's Appointments have been of high caliber.

QUESTION:

#1e) One Carter appointee given a split "Qualified/Unqualified" rating was Harry E. Claiborne. As you will recall, he was impeached by the House and convicted by the Senate in 1986 for his misconduct.

Isn't it true that another Carter appointee -- Alcee Hastings of Florida -- has also been recommended for impeachment?

ANSWER:

I believe that is true.

QUESTION:

#2a) The extensive studies on the Reagan Administration Judicial Appointments, done by Professor Sheldon Goldman, make two interesting conclusions in the comparison of the Carter and Reagan Appointments. First, Professor Goldman finds that there is no objective evidence to indicate that this administration has used any issue-specific "litmus-test" to accept or reject candidates. To quote Professor Goldman:

> "Justice officials correctly believe it to be improper to question candidates as to how they would decide cases....Rather, they are concerned with an individual's overall judicial philosophy and concept of the judicial role...It is a candidate's general philosophy, not how he or she will decide a particular issue, that is of principal concern."

Secondly, Goldman finds that the Judicial Selection Commissions created by Carter to promote so-called "merit" selection actually were more likely to lead the litmus-tests than anything we've observed since.

Do you have any objective evidence that is contrary to these findings by Professor Goldman?

ANSWER:

No, except anecdotal accounts from individual women candidates who have been questioned aggressively regarding their views on abortion issues.

QUESTION:

#2b) A 1980 study of the Carter Nominating Commission process reports that --

> "Applicants had often been questioned by judicial Selection Panelists about nine contemporary social issues. The four areas which received most attention were the Equal Rights Amendment, Affirmative Action, First Amendment Freedoms, and Defendant's Rights. Candidates were also asked about Abortion, Capital Punishment, Busing, Economic Regulations, and a number of pending Supreme Court Cases." [study by Berkson and Carbon, "The U.S. Circuit Judges Nominating Commissions"]

ANSWER:

No. Judges are not - or should not be - politicians. They must decide cases based on the law and the facts of the lawsuits before them. The perception that the parties have that their cases will be decided fairly and on the facts and the law will be severely diminished if the judge has committed himself or herself to a particular position before appointment.

QUESTION:

#3a) As a candidate for President, Jimmy Carter made this statement:

> "All Federal judges and prosecutors should be appointed strictly on the basis of merit without any consideration of political aspect of influence...Independent, blue-ribbon judicial selection committees should be established to give recomnendations to the President of the most qualified persons available for positions when vacancies occur.

As President, however, Jimmy Carter was quite candid in stating his intentions on what qualifications one needed to be appointed to the Federal Judiciary. As he put it:

> "If I didn't have to get Senate Confirmation of appointees, I could tell you flatly that 12 percent of my appointees would be Black, and 3 percent would be Spanish-speaking and 40 percent would be women and so forth."

In your opinion, should the Senate insist on strict racial and gender quotas in evaluating a President's nominations?

ANSWER:

No.

QUESTION:

#3b) Do you think race and gender, standing alone, makes a judge more likely or less likely to be suited to sit in judgment of fellow citizens?

ANSWER:

No. That is why it is so distressing that the Administration's approach to the appointments process makes it appear that they believe that only white males are suited to sit in judgment of their fellow citizens. (See my remarks before the Judiciary Committee, February 2, 1988).

Sincerely,

Judith C Chirlin

Judith C. Chirlin, for the
National Association of Women Judges

JCC:sk
cc: Judge Judith McConnell
Marilyn Nejelski
Susan Keilitz

STATEMENT OF ESTELLE H. ROGERS, NATIONAL DIRECTOR, FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

Ms. **Rogers**. Thank you, Senator. My name is Estelle Rogers and I am the National Director of the Federation of Women Lawyers' Judicial Screening Panel, which has evaluated nominees to the Federal judiciary since 1979, on the basis of their demonstrated commitment to equal justice.

I am pleased to give this testimony before you today on the subject of appointments to the Federal bench, and I wish to thank you, Senator Kennedy, for convening and holding this important hearing.

Before I go on with my prepared remarks, I would like to make one factual correction. It probably is not the only factual error, but one that hit me, in Mr. Markman's testimony. He seems to take great pride in the fact that this administration has not nominated anyone who received an ABA rating of not qualified.

This is patently untrue. They nominated someone named Sherman Unger who had the unfortunate fate of dying before his nomination was fully considered by this committee, but he had received a not qualified rating from the American Bar Association.

The Federation of Women Lawyers was created in 1979 after the Omnibus Judgeships Act gave President Carter 152 new judicial positions to fill, and it grew from the recognition, now shared by many others, that the Federal judiciary should be composed of women and men who have demonstrated their commitment to equal justice.

I guess in this regard, the Assistant Attorney General was right: we do not really share an affinity with regard to a commitment to equal justice.

At that time, of course, the crucial role of the Federal courts in protecting our rights and liberties was not so much a part of the public consciousness as it is today, but a number of prominent attorneys active in the then burgeoning movement seeking equal rights for women through the courts, realized from personal experience that a judiciary sensitive to the struggles of women and minorities was a goal worthy of significant and continuous attention.

Though this goal is not the same as the objective of diversity on the Federal bench, it is related. The appointment of more women and minorities is important partly because judgeships have traditionally rewarded significant accomplishment in the legal profession, and also because diversity on the bench increases public confidence in the ability of the Federal courts to respond fairly and equitably to the legal claims of all the American people.

The greatly increased numbers of women and minorities appointed to judicial appointments by the Carter administration were the result of several factors. First, the 1978 Executive Order requiring judges to have demonstrated their commitment to equal justice, and, with your permission, Senator, I would like to insert that Executive Order in the record of this hearing.

Senator **Kennedy**. It will be so entered.

[The information of Ms. Rogers follows:]

NEW EXECUTIVE ORDER FOR COURT OF APPEALS NOMINATIONS

43 FR

[3195-01]

The President

Executive Order 12059 May 11, 1978

United States Circuit Judge Nominating Commission

SEC. 4. *Standards for Selection of Proposed Nominees.* (a) Before transmitting to the President the names of the persons it deems best qualified to fill an existing vacancy or vacancies, a panel shall have determined:

(1) That those persons are members in good standing of at least one state bar, or the District of Columbia bar, and members in good standing of any other bars of which they may be members;

(2) That they possess, and have reputations for, integrity and good character;

(3) That they are of sound health;

→ * (4) That they possess, and have demonstrated, outstanding legal ability and commitment to equal justice under law; and

(5) That their demeanor, character, and personality indicate that they would exhibit judicial temperament if appointed to the position of United States Circuit Judge.

(b) In selecting persons whose names will be transmitted to the President, a panel shall consider whether the training, experience, or expertise of certain of the well qualified individuals would help to meet a perceived need of the court of appeals on which the vacancy or vacancies exist.

(c) To implement the above standards, a panel may adopt such additional criteria or guidelines as it considers appropriate for the identification of potential nominees and the selection of those best qualified to serve as United States Circuit Judges.

(d) Each panel is encouraged to make special efforts to seek out and identify well qualified women and members of minority groups as potential nominees.

43 Fed. Register

presidential documents

[3195-01-M]

Title 3—The President

Executive Order 12097 **November 8, 1978**

Standards and Guidelines for the Merit Selection of United States District Judges

By virtue of the authority vested in me as President by the Constitution and the statutes of the United States of America, including Section 7(a) of the Omnibus Judgeship Act of 1978, providing that the President shall promulgate and publish standards and guidelines for the selection of nominees for United States district court judgeships, it is hereby ordered as follows:

1-1. *Nomination of District Judges.*

1-101. Whenever a vacancy occurs in a district court of the United States, the President shall nominate as district judge to fill that vacancy a person whose character, experience, ability, and commitment to equal justice under law qualifies that person to serve in the federal judiciary.

1-102. The Attorney General shall assist the President by recommending to the President persons to be considered for appointment who are qualified to be district judges and by evaluating potential nominees. The Attorney General shall receive recommendations of such persons from any person, commission or organization.

1-103. The use of commissions to notify the public of vacancies and to make recommendations for district judge is encouraged. The Attorney General shall make public the suggested guidelines for such commissions.

1-104. Before making recommendations, the Attorney General shall consider whether:

(a) Public notice of the vacancy has been given and an affirmative effort has been made, in the case of each vacancy, to identify qualified candidates, including women and members of minority groups;

(b) The selection process was fair and reasonable;

(c) The person or persons recommended meet the standards for evaluation set forth in Section 1-2 of this Order.

1-105. In evaluating proposed nominees, consideration will be given to reports of Department of Justice investigations and all other relevant information concerning potential nominees and their qualifications.

1-2. *Standards for Evaluating Proposed Nominees.*

1-201. The standards to be used in determining whether a person is qualified to serve as a district judge are whether that person:

(a) Is a citizen of the United States, is a member of a bar of a state, territory, possession or the District of Columbia, and is in good standing in every bar in which that person is a member;

(b) Possesses, and has a reputation for, integrity, good character, and common sense;

(c) Is, and has a reputation for being, fair, experienced, even-tempered and free of biases against any class of citizens or any religious or racial group;

(d) Is of sound physical and mental health;

(e) Possesses and has demonstrated commitment to equal justice under law;

(f) Possesses and has demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes;

(g) Has the ability and the willingness to manage complicated pretrial and trial proceedings, including the ability to weigh conflicting testimony and make factual determinations, and to communicate skillfully with jurors and witnesses.

1–3. *Amendments of Existing Orders.*

1–301. Section 3(b) of Executive Order 12059 of May 11, 1978, is amended to read as follows:

"(b) The Panel for the District of Columbia Circuit shall have the additional function of recommending nominees for the United States District Court for the District of Columbia. In exercising this function, the panel shall use the standards set forth in Executive Order 12097 and shall forward its recommendations to the Attorney General.".

1–302. Executive Order 12084, of September 27, 1978 is amended in the following respects:

(1) Section 1–202(d) is amended to read as follows:

"(d) report to the Attorney General, within the time specified in the notification, the results of its activities, including a list of persons whom the Commission considers to be best qualified to fill the vacancy.".

(2) Section 1–203 is amended to read as follows:

"1–203. In evaluating potential nominees, the Commission shall use the standards prescribed in Executive Order 12097.".

Jimmy Carter

THE WHITE HOUSE,
November 8, 1978.

[FR Doc. 78-31862 Filed 11-8-78; 2:50 pm]

Ms. Rogers. Second, aggressive outreach on the part of that administration to women's and minority groups, and third, a commitment to overcoming the effects of past discrimination. None of these factors is operative today.

It is unseemly that all, or nearly all sex and race discrimination claims in a given court should be heard by white male judges. Yet if the appointment policies established by this administration were to continue unabated, that regressive scenario would be a reality in many jurisdictions.

It is somehow refreshing to me, that after 7 years of dissembling by the Reagan administration with regard to its commitment to appoint more minorities and women to the Federal bench, Assistant Attorney General Markman has finally acknowledged, in his written submission to this committee, and in what he said here today, that the administration has taken absolutely no measures to encourage the appointment of women and minority judges, effectively ignoring whole populations of qualified individuals.

Perhaps the so-called balance they say they have been trying to strike is merely ideological. About this they have been most straightforward. Certainly, it has little to do with gender, and even less to do with race.

In fact this administration's percentage of black appointments is the lowest in 25 years. That is, since before the maturity of the civil rights movement, when there were virtually no black students in our law schools.

Let me focus for a moment on the appointment of women to the Federal bench by the Reagan administration.

On both the circuit court and district court levels, of the nominees cited by Mr. Markman in his statistics supplied to this committee, slightly less than 8 percent were women.

This should be compared to the Carter administration, where 19.6 percent of the circuit court appointments, and 14.4 percent of the district court appointments were women.

This rather stunning retreat is particularly ironic and inexcusable in view of the intervening demographic changes in the legal profession, where women are just now attaining substantial representation in the age groups and experience levels from which the judges are being selected.

As of 1985, 13.1 percent of the Nation's 665,000 attorneys were women. In the same year, of lawyers aged 35 through 39, over 20 percent were women.

Since then the pool of qualified women has only increased, and yet this administration's record of appointing women to the district courts has actually declined in its second term.

The reasons for this abysmal record are many, and have been the subject of numerous commentaries, one of which, an article by Elaine Martin, I would also like, with your permission, to insert in the record, Senator.

Senator Kennedy. It will be so entered.

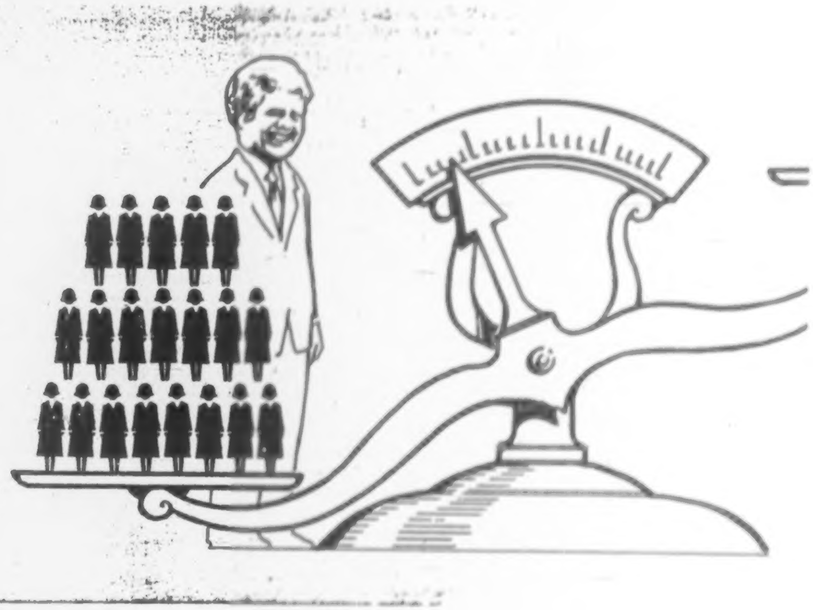
[The information of Ms. Rogers follows:]

Gender and judicial selection: a comparison of the Reagan and Carter administrations

In his first term, Reagan appointed far fewer women judges than did Carter. The reasons, suggests the author, include his refusal to mount a special effort to appoint women, his abandonment of merit panels, and his emphasis on ideology.

by Elaine Martin

In the last decade we have witnessed a major change in the selection of federal judges. Prior to 1976, when President Carter took office, only eight women had ever served on the federal bench.[1] Carter appointed 11 women to the U.S. appeals courts and 29 to the federal district courts. President Reagan, in his first term of office, appointed the first woman to the U.S. Supreme Court, one woman to the appeals court, and 12 women to the federal district courts. (See Table 1 and Figure 1.) Although Rea-



---

[1] Martin, *Women on the federal bench: a comparative profile*, 65 JUDICATURE 306 (1982).

[2] Goldman, *Reagan's judicial appointments at mid-term: shaping the bench in his own image*, 66 JUDICATURE 335 (1983).

[3] Schroeder, "Statement on appointments of women by President Reagan," September 20, 1983; Cohodas, *Reagan Has Been Slow in Appointing Women, Blacks and Hispanics to Federal Judiciary Seats*, 39 CONG. Q. 2550 (1981); *See also* Kamen, *Reagan's Judges: They're White, Male, Republican and Very Rich*, THE WASHINGTON POST NATIONAL WEEKLY, March 11, 1985, at 34.

[4] Goldman, *Reaganizing the judiciary: the first term appointments*, 68 JUDICATURE 313 (1985).

Feminists claim active resistance on the part of the Reagan administration in appointing women judges.

ROBERT ROBERTSON

Table 1 Women appointments to federal courts

	Percentage of total appointments				
	Reagan (first term)	Carter	Ford	Nixon	Johnson
District court	9.3% n=12	14.4% n=29	1.9% n=1	.6% n=1	1.6% n=2
Appeals court	3.2% n=1	19.6% n=11	—	—	2.5% n=1

Source: Derived from Goldman, "Reaganizing the judiciary: the first term appointments," 68 *Judicature* 313 (1985).

Figure 1 Women federal judges appointed by Presidents Carter and Reagan in first four years of office, 1976-1984

Appeals courts

Carter appointments
Betty Fletcher (9th Circuit)
Ruth Ginsberg (D.C. Circuit)
Amalya Kearse (2nd Circuit)
Cornelia Kennedy (6th Circuit)
Phyllis Kravitch (5th Circuit)
Dorothy Nelson (9th Circuit)
Carolyn Randall (5th Circuit)
Mary Schroeder (9th Circuit)
Dolores Sloviter (3rd Circuit)
Stephanie Seymour (10th Circuit)
Patricia Wald (D.C. Circuit)

Reagan appointment
Cynthia Hall (9th Circuit)

District courts

Carter appointments
Ann Aldrich (N.D. OH)
Susan Black (M.D. FL)
Ellen Burns (D. CT)
Carmen Cerezo (D. PR)
Barbara Crabb (W.D. WI)
Orinda Evans (N.D. GA)
Helen Frye (D. OR)
Susan Getzendanner (N.D. IL)
Joyce Green (D. D.C.)
Norma Johnson (D. D.C.)
Judith Keep (S.D. CA)
Mary Johnson Lowe (S.D. NY)
Consuelo Marshall (C.D. CA)
Gabrielle McDonald (S.D. TX)
Diana Murphy (D. MN)
Marilyn Patel (N.D. CA)
Mariana Pfaelzer (C.D. CA)
Sylvia Rambo (M.D. PA)
Marylou Robinson (N.D. TX)
Barbara Rothstein (W.D. WA)
Elsijane Roy (E. & W.D. AR)
Norma Shapiro (E.D. PA)
Anna Diggs Taylor (E.D. MI)
Anne Thompson (D. NJ)
Zita Weinshienk (D. CO)
Veronica Wicker (E.D. LA)
Rya Zobel (D. MA)
Patricia Boyle (E.D. MI)*
Shirley Jones (D. MD)*

Reagan appointments
Sarah Evans Barker (S.D. IN)
Maryanne Trump Barry (D. NJ)
Julia Gibbons (W.D. TN)
Cynthia Hall (C.D. CA)**
Elizabeth Hallanan (S.D. WV)
Elizabeth Kovachevich (M.D. FL)
Shirley Kram (S.D. NY)
Carol Los Mansmann (W.D. PA)***
Lenore Nesbitt (S.D. FL)
Ilana Rovner (N.D. IL)
Pamela Rymer (C.D. CA)
Alicemarie Stotler (C.D. CA)

* No longer serving, 1988.
** Elevated to appeals court in Reagan's first term.
*** Elevated to appeals court in Reagan's second term.

gan's record of women appointments is exemplary compared to those of presidents Ford, Nixon and Johnson, it is far below Carter's.

Judicial scholar Sheldon Goldman has asserted that the Reagan administration, unlike Carter's, appears largely indifferent to affirmative action for the judiciary.[2] Feminists claim not mere indifference but active resistance on the part of the Reagan administration.[3] The differences between the Carter and Reagan philosophies on affirmative action appear to offer a ready explanation for Reagan's poorer record. However, the situation may be more complex.

Carter broke from tradition, not only in his affirmative action efforts, but also in his establishment of circuit judge nominating panels and his encouragement of senatorial commissions for the nomination of district judge candidates. Reagan reverted to the traditional practice of "senatorial courtesy" for district court nominees and abandoned the circuit judge nominating commission. Most notably, Reagan began an emphasis on the ideological "correctness" of his potential nominees not seen since the days of Franklin Delano Roosevelt.[4] These two practices—reliance on senatorial courtesy and ideological tests—may have done much to restrict the number of qualified women in Reagan's candidate pool. This possibility, in conjunction with an unwillingness to take aggressive affirmative action to increase the pool of eligible women, could explain Reagan's relatively poor record of women appointments.

This article will consider the impact of three variables on Reagan's record in appointing women judges: his eligible pool philosophy, his selection process and his emphasis on ideology. Information for this analysis was drawn from a variety of sources. Biographical information about Carter-appointed women came from Senate Judiciary Committee questionnaires. Information about Reagan-appointed women came from various biographical directories. And information about both Carter-appointed and Reagan-appointed men was extrapolated from published works by Sheldon Goldman.[5] Information about sex-role attitudes was drawn from a mail-out survey conducted by the author.

It is important to note that although Reagan made 13 women appointments to the federal courts during his first term, only 12 women were actually appointed, because one received two appointments. Cynthia Hall was initially appointed to the district court (Central District of California) and subsequently elevated to the Ninth Circuit Court of Appeals. Therefore, all comparisons made here between Reagan and Carter women judges are of district court judges only and include Cynthia Hall. The universe of women judges analysed in this study is unavoidably small, so care must be taken in drawing conclusions.

The eligible pool

The most common explanation for the historical lack of women federal judges has been that not enough qualified women have been in the eligible pool of lawyers. The "eligible-pool" theory contends that a major reason for the underrepresentation of women in public life is that they are underrepresented in the eligible pool from which officials are drawn.[6] Thus, although individual women may possess the qualifications of status, education, experience or influence considered necessary for office, the percentage of women with these qualifications is lower than that of men.

There is evidence to support this explanation: Women are underrepresented in the legal profession;[7] women politicians are much less likely than male politicians to be lawyers;[8] few women have judicial experience;[9] women lawyers don't have the career patterns valued by the American Bar Association, an important agent in the federal judicial selection process;[10] and women are less likely to have the political experience necessary to bring them to the attention of senator-sponsors.[11]

Not enough qualified women have been in the eligible pool of lawyers.

A major difference between the Carter and Reagan administrations is their differing attitudes about how to deal with eligible pool issues. For example, Deputy Attorney General Edward Schmults of the Reagan administration has stated:

> We certainly are interested in reaching out and into the applicant pool for well-qualified minorities and women, but I think once people are in this pool, we are looking for the very best judges we can find.[12]

On the other hand, Carter's attorney general Griffin Bell stated before the United States Senate:

> Suppose you had five names and you had three white males exceptionally well-qualified... You have one black and one woman, and they are qualified. It is a court of 25 judges, and there is not a woman or black on the court. What do you do?... I think about it, and I say, Well, to redress the imbalance, I think we ought to nominate the black and the woman.[13]

ABA ratings

The quotes from Reagan and Carter spokesmen describing their administration's respective positions on the question of competitive qualifications for potential women nominees appear to be well borne out by American Bar Association (ABA) ratings. A comparison of ABA ratings by gender shows dramatic differences between the two administrations (see Table 2).

Table 2: ABA ratings, district court

	Reagan		Carter	
	Men	Women	Men	Women
Exceptionally well-qualified	7.7%	— n=0	4.0%	— n=0
Well-qualified	43.6% n=61	41.7% n=5	[illegible] n=[illegible]	24.1% n=7
Qualified	48.7% n=67	58.3% n=7	42.0% n=74	75.9% n=22
Not qualified	—	—	1.7% n=3	—

Source: Men derived from Goldman, "Reorganizing the judiciary: the first term appointments," 68 Judicature 313 (1985). Women from letter from Congressman Howard Wolpe (D Mi.), October 8, 1985.

Although Carter's men appointees were somewhat more likely than Reagan's to receive the top two ABA ratings of exceptionally well-qualified and well-qualified, his women appointees were far less likely to do so. This suggests that Carter introduced a standard of representativeness in selecting women, just as described by Attorney General Bell. Reagan does not appear to be wholly indifferent to affirmative action efforts. His women judges earned substantially fewer ratings of well-qualified than his men judges and none of his women judges were rated exceptionally well-qualified. Nevertheless, the ratings "gap" between Reagan's men and women is markedly less than that between Carter's. Reagan men received the top two ratings 51.3 per cent of the time, compared to 41.7 per cent of his women appointments. Carter appointed men received the top two ratings 55.5 per cent of the time, compared to only 24.1 per cent of his women appointments. It appears that Reagan is less willing than

---

[5] Supra n. 2; supra n. 4.

[6] Welch, *Recruitment of Women to Public Office: A Discriminant Analysis*, 31 West. Pol. Q. 372 (1978).

[7] Epstein, Women In Law (New York: Basic Books, 1981).

[8] Jennings and Farah, "Social Roles and Political Resources: An Overtime Study of Men and Women in Party Elites," paper presented to the 1978 Midwest Political Science Association Meeting, Chicago; Hill, "A Time Series Analysis of Female Representation in the Legislatures," paper presented to the 1980 Midwest Political Science Association Meeting, Chicago.

[9] Nejelski, "Women in the Judiciary: A Status Report," speech given to the National Women's Political Caucus, Washington, DC, 1984.

[10] Castillo, *Women Ask Rise in Status as Lawyers*, N.Y. Times, February 10, 1981, at A-8; Mann, *New Politics Helps Pick Judges*, L.A. Times, February 20, 1979, at 5.

[11] Carroll, Women As Candidates in American Politics (Bloomington: Indiana University Press, 1985); Slotnick, *The paths to the federal bench: gender, race and judicial recruitment variation*, 67 Judicature 371 (1984).

[12] Cohodas, supra n. 3, at 2560.

[13] *The Selection and Confirmation of Federal Judges, Hearings Before the Committee on Judiciary, United States Senate*, 96th Cong., 1st Sess. January 25, 1979, part 1, p. 25.

Table 3: Background characteristics, district court

	Women		Men	
	Reagan n=12	Carter n=29	Reagan n=117	Carter n=173
Occupation at appointment				
Politics/government	25.0%*	6.9%	6.0%	4.0%
	n=3	n=2	n=7	n=7
Judicial	41.7	65.5	38.5	41.0
	n=5	n=19	n=45	n=71
Private law firm	25.0	24.1	50.4	51.4
	n=3	n=7	n=59	n=89
Other	8.3	3.4	5.1	3.5
	n=1	n=1	n=6	n=6
Experience				
Judicial	66.7	69.0	48.7	52.0
	n=8	n=20	n=57	n=90
Prosecutorial	50.0	34.5	42.7	39.3
	n=6	n=10	n=50	n=68
Neither	8.3	27.6	30.8	28.3
	n=1	n=8	n=36	n=49
Political activism	50.0	27.6	62.4	66.5
	n=6	n=8	n=73	n=115
Average age	49.3	46.4	49.9	50.5
	n=12	n=29	n=117	n=173

*All government attorneys
Source: Men derived from Goldman, "Reaganizing the judiciary: the first term appointments," 68 Judicature 313 (1985). Women from biographical directories; Senate Judiciary Committee records; "Confirmation Hearings on Federal Appointments, Committee on the Judiciary," 96th Cong. 2nd Sess., (1980); and Martin, "Women on the federal bench: a comparative profile," 65 Judicature 306 (1982)

Carter to reach deeper into the qualified pool to appoint women.

ABA ratings often have been criticized for their conservative bias against nontraditional judicial candidates. Evidence suggests strongly that the generally lower ratings accorded to women and minority candidates is not an accurate reflection of genuinely lower qualifications for judicial office.[14] For example, three of the four women judges among Reagan appointees, listed by Sheldon Goldman as having "political and legal credentials worthy of special note," were rated only "qualified" by the ABA.[15]

It has long been argued that the Committee on Federal Judiciary of the ABA, which rates judicial candidates, favors older, well-to-do, business-oriented corporation attorneys.[16] This emphasis tends indirectly to downgrade the ratings of many women. A chairperson of the committee during the Carter administration points out that because of women's relatively recent entry into the field of law they tend to have less trial experience and breadth of experience. However, he claims:

> Consequently, they often come up with some awful good people who come out qualified rather than well-qualified. In a few years they'd be well-qualified.[17]

Women lawyers as a group do not follow the same career paths as men.

Elliot Slotnick has suggested that the primary issue is not merit *versus* affirmative action, but rather the issue of whose definition of merit is to prevail.[18] In this respect, ABA ratings seem to say that Reagan has been more responsive to merit—as defined by the traditional standards of the established legal community—than was Carter in his women appointments, even though Reagan has downplayed the prenomination role of the ABA in judicial selection.[19]

Career and other characteristics

Another way to consider the role of affirmative action theories in the definition of merit is to compare some of the career characteristics of judges appointed by Reagan and Carter. Women lawyers as a group do not follow the same career paths that men follow. Thus, to expand the eligible pool of potential women judges it is necessary to look for different career characteristics among women than traditionally found in a predominantly male pool of judicial applicants. Earlier studies demonstrate clearly that this is what Carter did to select his precedent-breaking number of women.[20] Only a few of these differences will be dealt with here (see Table 3).

Women appointed to the federal courts by Carter do not conform to the experience and career patterns generally found among his men appointments. Carter's women were younger than the men and less likely to be partners in traditional law firms. Their most obvious deviation from the male norm was in their relatively low level of political party activism and their extensive judicial experience. It would appear that Carter chose to emphasize judicial experience to compensate for other attributes the women candidates might have lacked compared to men candidates.

Women appointed by Reagan were almost identical to Carter-appointed women in three respects: they were younger, less likely to have been in private law practice when appointed and more likely to have had judicial experience than men appointees. Women tended to be about four years younger then men and were about half as likely to have been in private practice. About two-thirds of women from both administrations, compared to about half of men, had prior judicial experience.

Reagan-appointed women differed most from Carter women appointees in their prosecutorial experience and their political activism. Although Carter women judges were highly likely to have been sitting judges when appointed, Reagan women were no more likely than men from either administration to be on the bench. Instead, they were more likely to have been government attorneys. The number is small (three), but goes counter to recent trends against appointing prosecutors directly to the bench.[21]

The statistics on women voters' relatively low levels of political activism would lead us to expect women judicial candidates of either administration to be less active then men. This expectation holds true. Both Carter-appointed women and Reagan-appointed women were less politically active than their men counterparts; yet, this gap is much less for Reagan appointees. Reagan's men appointments were slightly less likely than Carter's to be politically active, while his women judges were almost twice as likely as Carter's to have been politically active. An examination of biographical information shows that, unlike Carter appointees, all of the politically active women appointed by Reagan had been prominent at the *national* level. This activity ranged from participation in the national Republican women's conference to working in presidential and senatorial campaigns.[22]

---

[14] Slotnick, *The ABA Standing Committee on Federal Judiciary: a contemporary assessment-part 1; The ABA Standing Committee on Federal Judiciary: a contemporary assessment-part 2*, 66 JUDICATURE 348, 385 (1983).

[15] Goldman, *supra* n. 4, at 320.

[16] Carp and Stidham, THE FEDERAL COURTS (Washington, DC: Congressional Quarterly Press, 1985).

[17] Neff, THE UNITED STATES DISTRICT JUDGE NOMINATING COMMISSIONS: THEIR MEMBERS, PROCEDURES AND CANDIDATES (Chicago: American Judicature Society, 1981).

[18] Slotnick, *Lowering the bench or raising it higher? Affirmative action and judicial selection during the Carter administration*, 1 YALE L. & POL. REV. 270 (1983).

[19] Baum, AMERICAN COURTS, PROCESS AND POLICY (Boston: Houghton Mifflin Company, 1986).

[20] Slotnick, *supra* n. 11.

[21] Goldman, *supra* n. 2.

Reagan-appointed women were significantly different from both Reagan-appointed men and all Carter appointees in the extent to which they had prior judicial or prosecutorial experience. Although about 30 per cent of Carter men and women and Reagan men had *neither* judicial nor prosecutorial experience, only one Reagan woman judge (nine per cent) had neither experience.

The differences between Carter and Reagan women judges are difficult to interpret. Certainly they share a number of characteristics that suggest a recognition by both administrations that women's legal career patterns are different from those of men and that these differences should not prevent women from becoming federal judges. On the other hand, the Reagan administration appears less willing than the Carter administration for its women nominees to deviate from the male pattern without an exceptionally strong track record of judicial, prosecutorial or political experience. If the emphasis on selecting women government attorneys is not accidental, it may not bode well for future women candidates because this is not a common career path for women.

Selection processes

The Carter administration, by deliberately *redefining* the eligible pool to de-emphasize the importance of political activism and to emphasize the importance of group representation, minimized women's differences in background.

Merit commissions produced many more names of potential women candidates.

Carter aides have said that he also worked strongly behind the scenes to persuade senators to increase nominations of women.[23] The selection process itself was changed in line with these changes in emphasis.

New institutional agents were created to aggressively recruit the best qualified candidates and especially to seek out qualified women and minorities.[24] Carter set up the U.S. Circuit Judge Nominating Commission and encouraged senators to use merit selection panels to nominate district court judges. These commissions served not only to expand the search for eligible women,[25] but probably also to promote their successful candidacy. A comparative study of successful and unsuccessful women political candidates found that those recruited by institutional agents (professional groups, political parties and political elites) were almost twice as likely to be elected as self-recruited women with the support of friends and relatives.[26]

Table 4: Merit panel nominees, district court

	Women 4 year term		Men 2 years only*	
	Reagan	Carter	Reagan	Carter
Panel	75.0%	75.9%	53.3%	64.8%
	n=6	n=22	n=32	n=94
Non-panel	25.0	24.1	46.7	35.2
	n=2	n=7	n=28	n=51

*Table covers Carter nominees from January 1, 1979 to January 20, 1981; Reagan nominees thru November 15, 1982
Source: Derived from Fowler, "A comparison of initial recommendation procedures: judicial selection under Reagan and Carter," 1 *Yale Law and Policy Review* 299, 310, 331, 340-41 (1983); Neff, *The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates*, 54-56, 136, 140-41 (Chicago: AJS, 1981).

The use of merit commissions to recommend names for federal court vacancies significantly expanded the number and types of people participating in the process of federal judicial selection. State bar associations, practicing attorneys, non-lawyers, women's and minorities' organizations and sitting judges officially joined the president, the Senate, and the American Bar Association in the determination of merit.[27] This expansion produced significantly more names of potential women candidates.[28] Slightly more than three-fourths of women appointees selected by Carter were nominated by commissions compared to slightly less than two-thirds of men.[29] (see Table 4)

The Reagan administration repudiated the selection commission concept. The practice of the Reagan administration for district court positions is to leave initial recommendation procedures up to Republican senators.[30] Although Reagan abolished the circuit nominating panels and placed less emphasis on the use of panels for district court positions, many Republican senators continued their use. As in Carter's administration, women judges in the Reagan administration were more likely than men to have been initially recommended by these merit panels. Seventy-five per cent of his total district court women appointments

---

[22] *See* Goldman, *supra* n. 2 and *supra* n. 4 for more biographical detail on some of these women.

[23] Lipshutz and Huron, *Achieving a more representative federal judiciary*, 62 JUDICATURE 483 (1979).

[24] Berkson, *Carter's judicial selection system: how well does it work?*, 19 JUDGES J. 4 (1980).

[25] Randall, *The success of affirmative action in the Sixth Circuit*, 62 JUDICATURE 486 (1979).

[26] Miller and Noyes, "Winners and losers: women candidates for municipal elections revisited," paper presented at the 1980 Midwest Political Science Association Meeting, Chicago.

[27] Berkson and Carbon, THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES (Chicago: American Judicature Society, 1980).

[28] Goldman, *Should there be affirmative action for the judiciary?*, 62 JUDICATURE 488 (1979).

[29] Neff, *supra* n. 17, at 136; Fowler, *A comparison of initial recommendation procedures: judicial selection under Reagan and Carter*, 1 YALE L. & POL. REV. 299 (1983); Slotnick, *Judicial selection systems and nomination outcomes: Does the process make a difference?*, 12 AM. POL. Q. 225 (1984).

[30] Goldman, *supra* n. 2 and 4; Brownstein, *With or without Supreme Court changes, Reagan will reshape the federal bench*, NATIONAL JOURNAL, December 8, 1984, at 2338; Kaman, *supra* n. 5.

Merit panel emphasis on experience may serve to promote women's candidacies.

Table 5: Attitudes on selected sex role issues among women judges

	Reagan judges			Carter judges		
Statement	Agree	Neutral	Disagree	Agree	Neutral	Disagree
Supportive of women on Supreme Court*	87.5% n=7	—	12.5% n=1	100.0% n=22	—	—
Interested in more women in public office	62.5 n=5	—	37.5 n=3	95.5 n=21	4.5 n=1	—
Supportive of women's movement	37.5 n=3	25.0 n=2	37.5 n=3	95.5 n=21	4.5 n=1	—
Impossible to combine career and motherhood	28.6 n=2	14.3 n=1	57.1 n=4	15.8 n= 3	10.5 n=2	73.7 n=14
Women face more family/career obstacles	87.5 n=7	—	12.5 n=1	66.7 n=14	23.8 n=5	9.5 n=2

*Questionnaires administered prior to Justice O'Connor's appointment stated, "Would you like to see a women on the Supreme Court?"; after her appointment the question stated, "Were you pleased to see a women on the Supreme Court?"

came from states with merit panels. One hundred per cent of Reagan-appointed women judges in the first two years of his first term were nominated by merit panels, a total of three (not shown in Table 4), compared to only 53 per cent of men.[31]

Research shows that Reagan panel nominees were much more likely than nonpanel nominees to have had judicial and government attorney experience.[32] This panel emphasis on experience and de-emphasis on political activism may serve to promote women's candidacies much as the same attitude did under Carter. It appears that the Reagan administration, in its shift away from nominating panels, has abandoned the most effective mechanism to date for including women in the eligible pool of judicial candidates.

The role of ideology

Presidents commonly attempt to introduce some degree of ideological correctness into the judicial selection process, and there is strong evidence of the importance of such considerations in predicting subsequent voting patterns of judges.[33] However, Reagan is increasingly accused of overstressing the role of ideology, particularly in his selection of women and minorities.[34]

An important part of Reagan's preferred judicial philosophy includes resistance to changes in traditional family values, particularly in the areas of abortion rights and national equal rights for women. It is commonly assumed, and to some extent validated by research,[35] that women in public life tend to be more liberal on these issues than their male counterparts. For example, Nina Totenberg of National Public Radio claims of the Reagan administration: "Given their ideological bias, there are not that many women and minorities available to them."[36] Others contend that the administration applies a double standard to women, in particular in the area of abortion. The case of Judith Whittaker is often cited to support this contention. Judith Whittaker, rated well qualified by the ABA, was a strong contender for a seat on the Eighth Circuit Court of Appeals until she was attacked by ultraconservatives for her alleged views on abortion.[37]

Administration spokesman Jonathan Rose from the Justice Department defends the emphasis on judicial philosophy as "entirely appropriate."[38] He also points out that Carter's use of merit commissions "didn't eliminate politics."[39]

Analysis by Sheldon Goldman of Reagan's first term judicial appointments shows some key differences in the backgrounds of Reagan judicial appointees and those of previous administrations. Goldman finds not only that Reagan district and appellate court judges are heavily Republican (97 per cent) but that as a group they are also more likely to have had some combination of previous judicial experience, *prominent* party activism and academic experience with published works than appointees from earlier administrations.[40] Goldman interprets these differences as evidence of the Reagan administration's attempt to uncover judicial philosophy by favoring candidates with proven track records. If Reagan does, indeed, apply a double standard for women, these same kinds of characteristics should show up even more strongly in their backgrounds than in those of Reagan men.

As indicated in Table 3 and discussed earlier, although there are background differences between men and women district court judges appointed by Reagan, some of these same gender differences occur among Carter judges. Carter, of course, may also have applied a double standard in demanding more judicial experience from women, but he is rarely criticized for this. The biggest, and most telling, difference between Reagan and Carter is the *extent* to which Reagan required judicial or prosecutorial experience from his women appointees. Ninety-seven per cent of Reagan-appointed women had either judicial or prosecutorial experience or both, while only about 70 per cent of other appointees of both administrations did.

Sex role attitudes

Another way to look at the role of ideology in the selection of women is to compare the sex role attitudes of Carter and Reagan women judges (see Table 5). Data were drawn from a mail-out questionnaire administered by the author. Although response rates were high, 76 per cent for Carter appointees and 73 per

---

31. Fowler, *supra* n. 29, at 311.
32. *Id.* at 347.
33. Gottschall, *Carter's judicial appointments: the influence of affirmative action and merit selection on voting on the U.S. courts of appeals*, 67 JUDICATURE 165 (1983).
34. Broll and Aron, *Judgeships made easy*, N.Y. TIMES, April 18, 1986, at 2E.
35. Cook, *Will women judges make a difference in women's legal rights?*, in Rendel (ed.), WOMEN, POWER AND POLITICAL SYSTEMS (London: Croom Helm, 1981).
36. Totenberg, "Women on the bench, the Constitution, and the Reagan administration," address to the National Association of Women Judges, Key Biscayne, FL, November 6-11, 1986.
37. *Political snipers and a good judge*, N.Y. TIMES, January 7, 1982, at 22.
38. Cohodas, *Reagan's judicial selections draw differing assessments*, 41 CONG. Q. WKLY REP., January 15, 1983, at 83.
39. Brownstein, *supra* n. 30.
40. Goldman, *supra* n. 4.

cent for Reagan appointees, actual numbers are quite low: 22 Carter judges and 8 Reagan judges. Consequently, percentage differences must be viewed with caution because only one or two judges may be involved, particularly with reference to Reagan respondents.

Differences are immediately apparent between Carter and Reagan women judges. Support for the notion of a woman on the Supreme Court elicited the strongest agreement between the two groups, 100 per cent of Carter judges and 85 per cent of Reagan judges. However, Carter judges were far more interested in seeing more women run for public office. More than 95 per cent of Carter judges indicated strong support for this notion, compared to less than two-thirds of Reagan judges. Although no Carter judges indicated a lack of support for more women in public office, over one-third (37.5 per cent) of Reagan respondents did so.

The biggest gap between the two groups was in their attitude toward the women's movement. More than 95 per cent of Carter-appointed women supported the movement compared to only 37.5 per cent of Reagan-appointed women. The same proportion of Reagan judges were opposed to the movement and 25 per cent were neutral.

Nearly three-fourths (73.7 per cent) of Carter judges disagreed with the notion that it was impossible to combine career and motherhood, while only 57.1 per cent of Reagan judges were likely to disagree with the statement. Reagan women were also much more likely to agree that women face more obstacles in their careers because of family obligations (87.5 per cent to 66.7 per cent).

It is risky to read too much into these responses. However, it seems possible that Reagan judges are less supportive of changing public roles for women because they perceive more conflict between such roles and private family obligations than do Carter judges.

Carter judges are clearly more strongly feminist than Reagan judges. Whether this difference is a natural one to be expected given their party affiliations or represents the use of tests for ideology is not clear. However, although comparable data is not available on all issues tested, Susan Carroll, in a nationwide study of women political candidates asked an identical question on the women's movement.[41] Her data show Reagan-appointed women judges to be far less supportive of the women's movement than other Republican women politicians, although Carter's appointees were well within the range of Democratic women politicians. Only 37.5 per cent of Reagan judges, compared to 64 per cent of Republican women candidates for Congress and 78.7 per cent of Republican women candidates for state senates, were supportive of the women's movement.[42] Thus, it appears that Reagan did apply stronger tests for ideology than did Carter in his selection of women. However, without comparable data on men appointees there is no way to know if double standards were applied.

Carter judges are clearly more strongly feminist than Reagan judges.

Conclusions

According to Sheldon Goldman:

> A special effort to appoint more women and minorities can result in a strengthened judiciary whose presence can reassure certain segments of the population of the neutrality and fairness of the judicial process.[43]

The Reagan administration's refusal to mount this special effort in the face of a small eligible pool of women judicial candidates is compounded by its abandonment of the merit panel concept and its emphasis on ideology.

An examination of the respective processes of judicial selection followed by presidents Carter and Reagan suggest that at least part of the difference in their records of appointing women is related to the use or non-use of merit nominating panels. About 75 per cent of women appointed by *both* Carter and Reagan to district court judgeships were nominated by panels; yet, under Reagan, the use of panels has declined.

The very high levels of judicial and prosecutorial experience and high rates (for women) of prominent political activism in the backgrounds of Reagan-appointed women judges suggests that they may have had to meet a stronger test for ideological track records than did Reagan men.

The results of the survey of sex role attitudes suggest that Reagan may have been successful in his attempt to select women judges who would support his emphasis on traditional family values. This ideological emphasis may further decrease the size of the eligible pool of Republican women judicial candidates.

Despite these differences between Reagan and Carter in their selection of women judges, care must be taken not to draw premature conclusions. Reagan has continued to appoint women to the federal bench during his second term. His total after five years in office stood at 22 women.[44] By the end of his second term the numbers may be high enough to permit more sophisticated statistical comparisons. ☐

---

[41] *Supra* n. 11.

[42] *Id.* at Table 8.2.

[43] Goldman, *Judicial selection and the qualities that make a "good" judge*, 462 ANNALS 112 (1982).

[44] Broll and Aron, *supra* n. 34.

ELAINE MARTIN is an assistant professor in the political science department at Eastern Michigan University.

Ms. ROGERS. Thank you. Among the reasons are the imposition of ideological litmus tests, the importance of party loyalty, and the abolition of merit selection panels, all of which have been hallmarks of this administration.

In addition, commitment to equal justice is no longer a job requirement, and recruitment of women and minorities has been discontinued.

But perhaps the overarching explanation is that they simply do not care about appointing women, and there is ample evidence for this proposition in the historical record.

When the Federation of Women Lawyers, or FWL, was created in 1979, with the sole purpose of monitoring the judicial selection and confirmation process, the Carter administration welcomed our interest and viewed it as an opportunity to receive the input of a new and growing constituency within the legal profession.

By Executive order, President Carter had made a demonstrated commitment to equal justice a criterion for appointment to the judiciary, and our mission was to review each prospective nominee, male and female alike, measured against that standard.

In order to facilitate our participation, the Justice Department, under Attorney General Griffin Bell, routinely gave both FWL and the National Bar Association the list of candidates under serious consideration for Federal judgeships, just as they shared the names with the American Bar Association.

Our involvement, at this early stage of the process, before an actual nomination took place, enhanced our effectiveness in at least two ways. First, it gave us more time for the extensive research and interviewing required to properly evaluate a candidate, and second, it allowed us to register our concerns, if we had any, at a time before the administration had publicly committed itself to a nominee, a time when it was easier to change its mind.

Perhaps even more importantly, though, the Carter administration's treatment of FWL, and the National Bar Association, sent a signal that the selection of Federal judges was no longer just an extension of the old boys' network, and for this we shall be eternally grateful.

The Justice Department of Attorney General William French Smith sent a very different signal. No longer would the administration share the names of its candidates with FWL or the National Bar Association. No longer would commitment to equal justice be a requirement for those seeking appointment to the Federal judiciary.

No longer would Senators be encouraged to recommend women or minorities. This, despite the pledges of President Reagan, and later, of Attorney General Meese, which have been quoted this morning.

At his confirmation hearing on October 17th, 1985, Assistant Attorney General Markman committed himself to consulting regularly with the National Bar Association, and the Federation of Women Lawyers.

The Federation of Women Lawyers never heard from Mr. Markman until February 12th, 1987, 16 months after that hearing, when, at a public forum, I reminded him of his unkept promise.

At first, he denied ever having made it. But after checking the transcript of his confirmation hearing, he called my office later that day to apologize for his error, and set up a meeting to discuss future cooperation.

Thereafter, he invited me on several occasions to suggest names of women for particular judicial vacancies. None of them has ever been nominated.

I recount all of this in detail to point out how casually this administration has made and reneged on its commitment to increase the representation of women and minorities in the judicial branch.

And now it seeks to excuse its poor performance by the incantation of a philosophical opposition to affirmative action. If Mr. Markman's office were not seeking women for those judgeships, why was I wasting my time finding them?

More importantly, why does this administration persist in misleading the American people of both genders, and all races, with its hollow promise that the Federal judiciary is no longer the exclusive province of white males.

It is time to send a new signal. We hope, that with this hearing, the Senate Judiciary Committee and the American people send President Reagan, Attorney General Meese, and Assistant Attorney General Markman, a clear signal that this record of judicial appointments of women and minorities is simply unacceptable, that it must be redressed in the opportunities remaining to this administration, and that no similar performance by any future administration, of either party, will be tolerated.

We all look forward to a day when the full integration of women and minorities into the upper echelons of Government and commerce can be accomplished without effort. In the meantime, however, this society has long recognized that those who have been historically excluded, whether by law or by custom, are entitled to a little extra effort.

It is especially fitting that we should demand that our national leaders expend such an effort with regard to appointments to the Federal judiciary. If we cannot expect those dispensing justice to reflect the diversity and richness of our society, then the promise of our democracy is hollow, indeed.

Thank you, Senator.

[The prepared statement of Ms. Rogers, and response to questions follow:]

Federation of Women Lawyers' Judicial Screening Panel
2000 P Street, N.W., Suite 515, Washington, D.C. 20036 (202) 822-6644

NATIONAL DIRECTOR
Estelle H. Rogers, Esq.

MEMBERS-AT-LARGE*
Rhonda Copelon, Esq.

Nancy Davis, Esq.
Equal Rights Advocates, Inc.

Sandra B. Durant, Esq.
National Bar Association

Mary Gray, Esq.
Women's Equity Action League

Marcia Greenberger, Esq.
National Women's Law Center

Janine D. Harris, Esq.
National Conference of
Women's Bar Associations

Ruth L. Harvey, Esq.
National Association of
Black Women Attorneys

Antonia Hernandez, Esq.
Mexican-American Legal Defense
and Educational Fund

Prof. Marilyn Ireland
Section on Women and Legal
Education, Association of
American Law Schools

Marsha Levick, Esq.
NOW Legal Defense and
Education Fund

Judith Lichtman, Esq.
Women's Legal Defense Fund

Miriam Newman, Esq.
National Association of
Women Lawyers

Susan Perry, Esq.
Women's Rights Task Force,
National Conference of
Black Lawyers

Lynn Hecht Schafran, Esq.

Phyllis N. Segal, Esq.

Maureen Thornton, Esq.
League of Women Voters
Education Fund

CIRCUIT REPRESENTATIVES
1st Circuit
Prof. Ruth F. Chevion

2nd Circuit
Debra L. Brown, Esq.

3rd Circuit
Deborah R. Willig, Esq.

4th Circuit
Elizabeth C. Honeywell, Esq.

5th Circuit
Joellen Snow, Esq.

6th Circuit
Elizabeth Barker Brandt, Esq.

7th Circuit
Aviva Futorian, Esq.

8th Circuit
Ragnhild Anne Westby, Esq.

9th Circuit (North)
Kimberly Osenbaugh, Esq.

9th Circuit (South)
Claudia Silverman, Esq.

10th Circuit
Betty Jones, Esq.

11th Circuit
Ellen Freidin, Esq.

D.C. Circuit
Emily Spitzer, Esq.

---

*Organizational affiliations for purposes of identification only

STATEMENT OF

ESTELLE H. ROGERS

on behalf of the

FEDERATION OF WOMEN LAWYERS' JUDICIAL SCREENING PANEL

Committee on the Judiciary
United States Senate

February 2, 1988

Mr. Chairman, members of the Judiciary Committee:

My name is Estelle Rogers, and I am the National Director of the Federation of Women Lawyers' Judicial Screening Panel (FWL), which has evaluated nominees to the federal judiciary since 1979 on the basis of their demonstrated commitment to equal justice. I am pleased to testify before you today on the subject of appointments to the federal bench, and I wish to offer our thanks to Senator Kennedy for convening and chairing this important hearing.

The Federation of Women Lawyers was created in 1979 after the Omnibus Judgeships Act gave President Carter 152 new judicial positions to fill, and it grew from the recognition, now shared by many others, that the federal judiciary should be composed of women and men who have demonstrated their commitment to equal justice. At that time, of course, the crucial role of the federal courts in protecting our rights and liberties was not so much a part of the public consciousness as it is today (thanks, in part, to the remarkable hearings on the Bork nomination). But a number of prominent attorneys active in the then-burgeoning movement seeking equal rights for women through the courts realized from personal experience that a judiciary sensitive to the struggles of women and minorities was a goal worthy of significant and continuous attention.

Though this goal is not the same as the objective of diversity on the federal bench, it is related. The appointment of more women and minorities is important first because judgeships have traditionally rewarded signficant accomplishment in the legal profession, and second because diversity on the bench increases public confidence in the ability of the federal courts to respond fairly and equitably to the legal claims of all the American people. The greatly increased numbers of women and minorities appointed to judicial positions by the Carter administration were the result of several factors: (1) the 1978 Executive Order requiring judges to have demonstrated their commitment to equal justice; (2) aggressive outreach to women's and minority groups; and (3) a commitment to overcoming the effects of past discrimination. None of these factors is operative today. It is unseemly that all or nearly all sex and race discrimination claims in a given court should be heard by white male judges. Yet if the appointment policies established by this administration were to continue unabated, that regressive scenario would be a reality in many jurisdictions.

It is somehow refreshing that, after seven years of dissembling by the Reagan administration with regard to its commitment to appoint more minorities and women to the federal bench, Assistant Attorney General Markman has finally acknowledged, in his written submission to this Committee, that the administration has taken absolutely no measures to encourage the appointment of women and minority judges, effectively ignoring whole populations of qualified individuals. Perhaps the so-called balance they have been trying to strike is merely ideological -- about this they have been most straightforward. Certainly it has little to do with gender, and even less to do with race. In fact, this administration's percentage of black appointments is the lowest in twenty-five years: that is, since before the maturity of the civil rights movement, when there were virtually no black law students.

Let me focus for a moment on the appointments of women to the federal bench by the Reagan administration. At the Circuit Court level, of 87 nominees, seven (or less than 8%) were women. In the District Courts, of 282 nominees, 22 (also less than 8%) were women.[1/] This should be compared to the Carter administration, where 19.6% of the Circuit Court appointments and 14.4% of the District Court appointments were women. This rather stunning retreat is particularly ironic and inexcusable in view of the intervening demographic changes in the legal profession, where women are just now attaining substantial representation in the age groups and

---

1/ Statistics cited were supplied by Assistant Attorney General Markman for the purpose of this hearing. We have in effect, given the administration credit for two extra women, since two of the Circuit Court judges had been previously nominated by President Reagan to the District Courts, and are thus counted twice.

experience levels from which the judges are being selected. As of 1985, 13.1% of the nation's 655,000 attorneys were women; in that same year, of lawyers age 35 through 39, over 20% were women. Since then, the pool of qualified women has only increased, and yet this administration's record of appointing women to the District Courts has actually declined in its second term.

The reasons for this abysmal record are many and have been the subject of numerous commentaries.[2/] Among the reasons are the imposition of ideological litmus tests, the importance of party loyalty, and the abolition of merit selection panels, all of which have been hallmarks of the Reagan administration. In addition, "commitment to equal justice" is no longer a job requirement, and recruitment of women and minorities has been discontinued. But perhaps the overarching explanation is that they simply don't care about appointing women, and there is ample evidence for this proposition in the historical record.

When the Federation of Women Lawyers was created in 1979, with the sole purpose of monitoring the judicial selection and confirmation process, the Carter administration welcomed our interest and viewed it as an opportunity to

---

2/ See, for example, Martin, "Gender and judicial selection: a comparison of the Reagan and Carter administrations," 71 Judicature, number 3, p. 136 (October-November 1987).

receive the input of a new and growing constituency within the legal profession. By Executive Order, President Carter had made a "demonstrated commitment to equal justice" a criterion for appointment to the judiciary, and our mission was to review each prospective nominee, male and female alike, measured against that standard.

In order to facilitate our participation, the Justice Department, under Attorney General Griffin Bell, routinely gave both FWL and the National Bar Association the list of candidates under serious consideration for federal judgeships, just as they shared the names with the American Bar Association's Standing Committee on Federal Judiciary. Our involvement at this early stage of the process, before an actual nomination took place, enhanced our effectiveness in at least two ways: first, it gave us more time for the extensive research and interviewing required to properly evaluate a candidate; and second, it allowed us to register our concerns, if we had any, at a time before the administration had publicly committed itself to a nominee, a time when it was easier to change its mind. Perhaps even more importantly, though, the Carter administration's treatment of FWL and the National Bar Association sent a signal that the selection of federal judges was no longer just an extension of the old boys' network, and for this we shall be eternally grateful.

The Justice Department of Attorney General William French Smith sent a very different signal. No longer would the administration share the names of its candidates with FWL or the National Bar Association. No longer would "commitment to equal justice" be a requirement for those seeking appointment to the federal judiciary. No longer would Senators be encouraged to recommend women or minorities. This, despite President Reagan's 1980 campaign promise to "...seek out women to appoint to...Federal courts in an effort to bring about a better balance on the Federal bench;" and the later pledge of Edwin Meese: "[I]f I am confirmed by the Senate as Attorney General, I will make the greatest search to try and find as many qualified people from all minority groups...for judgeships."

At his confirmation hearings on October 17, 1985, Assistant Attorney General Markman likewise committed himself to consulting with the National Bar Association and the Federation of Women Lawyers "not only in the evaluation process, but also in the recruitment process." The Federation of Women Lawyers never heard from Mr. Markman until February 12, 1987, 16 months after that hearing, when, at a public forum, I reminded him of his unkept promise. At first he denied having ever made it, but, after checking the transcript, he called my office late in the day to apologize for his error and to set up a meeting to discuss future cooperation.

Thereafter, he invited me on several occasions to suggest names of women for particular judicial vacancies. None of them has ever been nominated.

I recount all of this in detail to point out how casually this administration has made and reneged on its commitment to increase the representation of women and minorities in the judicial branch. And now it seeks to excuse its poor performance by the incantation of a philosophical opposition to affirmative action. If Mr. Markman's office were not seeking women for those judgeships, why was I wasting my time finding them? More importantly, why does this administration persist in misleading the American people, of both genders and all races, with its hollow promise that the federal judiciary is no longer the exclusive province of white males?

The District of Columbia's two federal courts boast perhaps the most telling and tragic legacy of the Reagan years. Of fourteen judicial vacancies, this President has seen fit to appoint fourteen white males, the overwhelming majority of whom were not even residents of this jurisdiction. In a city with a 70% black population and over 8,000 women and 3,000 minority attorneys in its own legal community, this is a disgraceful record. Unfortunately, in this administration, it is not an exception.

It is time to send a new signal. We hope that, with this hearing, the Senate Judiciary Committee and the American people send President Reagan, Attorney General Meese and Assistant Attorney General Markman a clear signal that this record of judicial appointments of women and minorities is simply unacceptable, that it must be redressed in the opportunities remaining to this administration, and that no similar performance by any future administration of either party will be tolerated.

We all look forward to a day when the full integration of women and minorities into the upper echelons of government and commerce can be accomplished effortlessly. In the meantime, however, this society has long recognized that those who have been historically excluded, whether by law or custom, are entitled to a little extra effort. It is especially fitting that we should demand that our national leaders expend such an effort with regard to appointments to the federal judiciary. If we cannot expect those dispensing justice to reflect the diversity and richness of our society, then the promise of our democracy is hollow indeed.

Federation of Women Lawyers' Judicial Screening Panel

2000 P Street, N.W., Suite 515, Washington, D.C. 20036 (202) 822-6644

NATIONAL DIRECTOR
Estelle H. Rogers, Esq.

MEMBERS-AT-LARGE*
Rhonda Copelon, Esq.

Nancy Davis, Esq.
Equal Rights Advocates, Inc.

Sandra B. Durant, Esq.
National Bar Association

Mary Gray, Esq.
Women's Equity Action League

Marcia Greenberger, Esq.
National Women's Law Center

Janine D. Harris, Esq.
National Conference of
Women's Bar Associations

Ruth L. Harvey, Esq.
National Association of
Black Women Attorneys

Antonia Hernandez, Esq.
Mexican American Legal Defense
and Educational Fund

Prof. Marilyn Ireland
Section on Women and Legal
Education, Association of
American Law Schools

Marsha Levick, Esq.
NOW Legal Defense and
Education Fund

Judith Lichtman, Esq.
Women's Legal Defense Fund

Miriam Newman, Esq.
National Association of
Women Lawyers

Susan Perry, Esq.
Women's Rights Task Force,
National Conference of
Black Lawyers

Lynn Hecht Schafran, Esq.

Phyllis N. Segal, Esq.

Maureen Thornton, Esq.
League of Women Voters
Education Fund

CIRCUIT REPRESENTATIVES

1st Circuit
Prof. Ruth F. Chevion

2nd Circuit
Debra L. Brown, Esq.

3rd Circuit
Deborah R. Willig, Esq.

4th Circuit
Elizabeth C. Honeywell, Esq.

5th Circuit
Joellen Snow, Esq.

6th Circuit
Elizabeth Barker Brandt, Esq.

7th Circuit
Aviva Futorian, Esq.

8th Circuit
Ragnhild Anne Westby, Esq.

9th Circuit (North)
Kimberly Osenbaugh, Esq.

9th Circuit (South)
Claudia Silverman, Esq.

10th Circuit
Betty Jones, Esq.

11th Circuit
Ellen Freidin, Esq.

D.C. Circuit
Emily Spitzer, Esq.

*Organizational affiliations for
purposes of identification only

February 16, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman,

Enclosed please find my answers to the written questions submitted by Senator Grassley after the February 2nd hearing on the judicial selection process in the Reagan administration.

If I can provide any further information, please do not hesitate to let me know.

Sincerely,

Estelle H Rogers

Estelle H. Rogers
National Director

ER/dc
enclosure

RESPONSES TO QUESTIONS FOR THE FIRST PANEL

POSED BY SENATOR GRASSLEY

#1a) I have never been one to place much weight in the A.B.A.'s rating of judges -- particularly for the Supreme Court, where this Judiciary Committee will conduct its own exhaustive investigation.

But let me ask this: How many Carter Administration District Court nominees were considered "not qualified" by the A.B.A Standing Committee?

ANSWER: My recollection is that there may have been 3 nominees rated "not qualified", one of whom was so rated because of a maximum age limit then imposed by the A.B.A. but subsequently abolished.

#1b) Has President Reagan ever appointed a judge found "not qualified" by the A.B.A.?

ANSWER: President Reagan nominated Sherman Unger, who was found not qualified by the A.B.A., to the United States Court of Appeals for the Federal Circuit. He died before a vote on his appointment could be taken by the Senate.

#1c) Would you agree that the A.B.A. is a relatively objective source for evaluating judicial candidates?

ANSWER: The A.B.A. is a useful source of factual and evaluative data on judicial candidates, as are many other organizations which scrutinize judicial nominees.

#1d) A.B.A. President William Falsgraf was quoted as stating the following in 1986:

> "Ideology is always a factor for a President. Putting that aside, the Reagan Appointments have been of the highest caliber". [quote from U.S. News and World Report, June 30, 1986.]

Is Mr. Falsgraf mistaken in his assessment of the Reagan Administration appointees?

ANSWER: Not having read the article in which Mr. Falsgraf was quoted, I have no way of knowing the context or the criteria he was using.

#1e) One Carter appointee given a split "Qualified/Unqualified" rating was Harry E. Claiborne. As you will recall, he was impeached by the House and convicted by the Senate in 1986 for his misconduct.

Isn't it true that another Carter appointee -- Alcee Hastings of Florida -- has also been recommended for impeachment?

ANSWER: I am aware from press accounts that the impeachment of Judge Hastings has been considered. I do not know whether a formal recommendation has been made or not.

#2a) The extensive studies on the Reagan Administration Judicial Appointments, done by Professor Sheldon Goldman, make two interesting conclusions in the comparison of the Carter and Reagan Appointments. First, Professor Goldman finds that there is no objective evidence to indicate that this administration has used any issue-specific "litmus-test" to accept or reject candidates. To quote Professor Goldman:

> "Justice officials correctly believe it to be improper to question candidates as to how they would decide cases...Rather, they are concerned with an individual's overall judicial philosophy and concept of the judicial role...It is a candidate's general philosophy, not how he or she will decide a particular issue, that is of principal concern.

Secondly, Goldman finds that the Judicial Selection Commissions created by Carter to promote so-called "merit" selection actually were more likely to lead the litmus-tests than anything we've observed since.

Do you have any objective evidence that is contrary to these findings by Professor Goldman?

ANSWER: Yes, there is some contrary evidence. As Assitant Attorney General Markman acknowledged in his confirmation hearings, the President did withdraw at least one nomination at the request of thirteen Senators who objected to the nominee on the basis of his views on abortion and gun control. During that period, several Senators routinely sent questionnaires to judicial nominees eliciting their views on a number of legal and social policy issues. Evidently they conveyed at least some of the answers to the White House. (Confirmation Hearings on Federal Appointments, 99th Congress, 1st Session, October 17, 1985, at 426-428) There have also been reports indicating that several prospective nominees were interrogated about their views on abortion. (See Confirmation Hearings, supra, at 430)

#2b) A 1980 study of the Carter Nominating Commission process reports that --

> "Applicants had often been questioned by Judicial Selection Panelists about nine contemporary social issues. The four areas which received most attention were the Equal Rights Amendment, Affirmative Action, First Amendment Freedoms, and Defendant's Rights. Candidates were also asked about Abortion, Capital Punishment, Busing, Economic Regulations, and a number of pending Supreme Court cases". [study by Berkson and Carbon, "The U.S. Circuit Judges Nominating Commissions"]

In your view, should a judicial nominee have to commit himself or herself on a variety of current legal matters, just like politicians, in order to be nominated to Federal office? If not, why?

ANSWER: All judicial nominees should be committed to equal justice and to adjudicating the matters which come before them in accordance with the Constitution and laws of the United States as they have evolved through our history.

#3a) As a candidate for President, Jimmy Carter made this statement:

> "All Federal judges and prosecutors should be appointed strictly on the basis of merit without any consideration of political aspect of influence...Independent, blue-ribbon judicial selection committees should be established to give recommendations to the President of the most qualified persons available for positions when vacancies occur".

As President, however, Jimmy Carter was quite candid in stating his intentions on what qualifications one needed to be appointed to the Federal Judiciary. As he put it:

> "If I didn't have to get Senate Confirmation of appointees, I could tell you flatly that 12 percent of my appointees would be Black, and 3 percent would be Spanish-speaking and 40 percent would be women and so forth".

In your opinion, should the Senate insist on strict racial and gender quotas in evaluating a President's nominations?

ANSWER: The Senate, on behalf of the nation as a whole, should insist upon diversity in the President's judicial nominations so that the judiciary more closely reflects the society in which it functions and upon which it depends for its efficacy and credibility.

#3b) Do you think race and gender, standing alone, makes a judge more likely or less likely to be suited to sit in judgment of fellow citizens?

ANSWER: No one characteristic, standing alone, makes a judge more or less likely to be suited to that role.

Senator **Kennedy**. Thank you. Mr. Duckenfield.

STATEMENT OF THOMAS DUCKENFIELD, VICE PRESIDENT, NATIONAL BAR ASSOCIATION

Mr. **Duckenfield**. To the distinguished Chairman, and members of the Committee on the Judiciary of the U.S. Senate, good morning.

I welcome, and thank you for this opportunity to speak on behalf of the National Bar Association regarding the critical issue of the nomination and appointment of blacks to the Federal bench.

The National Bar Association was founded in Des Moines, Iowa in 1925. It is the oldest and largest bar association of black lawyers in the United States.

Since its inception, the National Bar Association has been in the vanguard for justice for all. Many of its members were the legal giants who argued and won those landmark civil rights cases which gave meaning to equal justice under the law.

Today, the struggle continues for the inclusion of blacks in every aspect of the American life. And yet, as I appear before you, I find it unbelievable, but it is true, that during the Reagan presidency, 343 judges have been appointed to the Federal judiciary, and only 5 of these appointments have been blacks.

Thus, the performance of the Reagan administration in the appointment of blacks is singularly abysmal. In contrast, former President Carter, during his administration, appointed 265 Federal judges of whom 38 were blacks.

Although the Constitution of the United States has evolved from the point of specific exclusion of blacks to the inclusion of blacks within the letter of the law, we know that the real meaning of inclusion is not operative in the appointment of black judges to the Federal judiciary.

President Reagan has had 343 opportunities to enhance the representativeness of the judiciary, but has chosen to make his appointments a bastion of white males.

It is the view of the NBA, that it is crucial that the judiciary reflect the diversity of the American experience, for it is in this diversity that our Nation garners its uniqueness and strength.

This diversity can be achieved without sacrificing the quality of appointments. In my view, more ethnically and racially diverse appointments would add to, rather than subtract, from the overall quality of appointments.

The argument that there are few qualified black lawyers is wanting and without substance. Just consider that in 1970, there were roughly 3,845 black lawyers in the United States. Today, there are more than 22,000 black lawyers.

The more than sixfold increase shows that there is an available pool of qualified blacks from which to select judicial nominees. And so, the Reagan administration, if it were committed to an inclusive society and Government, could do much to change the complexion and representativeness of the judiciary.

Let me add that Mr. Markman's testimony concerns me greatly, and I am certainly concerned for all of us who are committed to a viable democracy.

The bottom-line test that he suggests as used by the Reagan administration appears to be reached without the full consideration of what we are all about as a country. He talks about the age bracket. He talks about the career path. But I would indicate to you, that the statistics will probably demonstrate that these criteria have been honored in the breach more than otherwise.

We are about opening up the process, and I would like to indicate here, that Senator Hatch has made my point well, when he said that "we ought not simply judge a nominee by the clients he or she represents." But if we were to follow the criteria used by the Reagan administration, it would appear that if you do not follow the traditional legal path, perhaps as a Justice Department or corporate lawyer, you are seriously in danger of not being considered.

And I think there is nothing wrong about having on our judiciary persons who have fought to make the Constitution meaningful. There is absolutely nothing wrong, to have those lawyers who have served, diligently, to enforce civil rights in this country.

Such a practice by the Reagan administration is something that we really are much concerned about.

Now, throughout the Reagan administration, the National Bar Association has requested of the Department of Justice, that the National Bar Association be included as an active participant in the selection and investigation process of judicial nominees.

I think it is of some moment that I pause here, and read into the record a letter that was sent to Mr. Meese on August the 22nd, 1985, for it represents a reaching out by the National Bar Association to be included, formally, in the selection and evaluation process.

> DEAR MR. MEESE: The National Bar Association is the oldest and largest bar association consisting primarily of black attorneys in this nation. The association was founded in 1925 when black attorneys were excluded by both policy and practice from membership in the American Bar Association. We have been in existence continuously since 1925. I am currently serving as president of the bar association for the 1985-86 term.
>
> This letter is a formal request to you on behalf of the NBA that the Department of Justice provide to us, for purposes of investigation, the names of potential nominees to the Federal courts in the same manner as you do with the American Bar Association. We feel keenly our exclusion from the formal investigation process, and would appreciate receiving the same courtesy and responses that are accorded to the ABA.
>
> In the past, we have been formally included in the process. At the same time, the ABA received the names of potential nominees, those names were also forwarded to us by the Department of Justice. Our views and input were actively sought.
>
> However, the practice of including us was discontinued during Mr. Reagan's first term, although we had expressly requested the Attorney General to continue to seek our views.
>
> During Mr. Reagan's second term, we are now making this request of you. We believe we have insights and information on potential nominees that the Department of Justice would welcome in making decisions about their fitness for the Federal bench. It is our sincere hope that you will formally include the National Bar Association in the selection and investigation process.

This letter was signed by Fred Gray. The response to this letter was a meeting in Mr. Meese's office. Now Mr. Meese stated, in no uncertain terms, that the National Bar Association would not be included in the selection and investigation process, that the Justice Department would rely heavily on the ABA.

For a moment, let me insert a brief comment about the District of Columbia Circuit. Some 14 judges have been appointed by President Reagan to the circuit and District courts here in the District of Columbia.

The appointments have been all white males with no connection to the local bar and/or community. Notwithstanding the view held by some, that the D.C. Court is a national court, there is absolutely no sound rationale to completely eliminate and discriminate against lawyers of the D.C. Bar for these appointments.

The D.C. Bar has over 35,000 lawyers, many of extraordinary distinction and experience. Moreover, the D.C. Circuit is situated in an area where the appointment of blacks would make a significant statement for the Federal judiciary.

The Reagan administration, therefore, must remove the imposed exclusion and discrimination against D.C. Bar members for consideration to appointment to the D.C. Circuit.

Yes, the National Bar Association contends that it is imperative that the Nation move with a strong commitment to include more blacks, women, and other minorities on the Federal bench. The fabric of this Nation will be strengthened by a Federal judiciary which is representative of all the people.

In closing, we black Americans have for too long borne the blunt and deadly blows of injustice embedded in the institutions of our Nation charged with the administration and dispensation of justice.

In this time of high technology, and just after the Bicentennial celebration of the United States Constitution, we Americans ought to be able to stand up and state that the union is inclusive for all its citizens in every way.

Certainly that is neither the case nor the direction of the Reagan administration with respect to the appointment of blacks, women, and minorities to the Federal bench.

We, of the National Bar Association, implore this Committee to exercise fully its constitutional mandate of advice and consent in a manner that will send a clear signal to the White House, that this is a Government of the people, for the people, and by the people.

Therefore, the Reagan administration needs to know that institutions of the Government, including the judiciary, must give credence to our diversity as a nation.

And before my final comment, I would like to indicate that the letter I read is attachment B and is included in my testimony that has been disseminated.

Again, I thank you for this opportunity to express the view of the National Bar Association on this very important subject.

I hope this committee has better luck than the National Bar Association in encouraging this administration to nominate more black judges. And I respectfully ask that my attachments be included in the record along with my statement.

Senator **Kennedy**. It will be so included.

[The prepared statement of Mr. Duckenfield follows:]

TESTIMONY OF THOMAS A. DUCKENFIELD, VICE PRESIDENT
NATIONAL BAR ASSOCIATION
BEFORE THE COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES SENATE

"HEARING ON THE PERFORMANCE OF THE REAGAN ADMINISTRATION ON THE NOMINATION OF WOMEN AND MINORITIES TO THE FEDERAL BENCH

FEBRUARY 2, 1988

To the distinguished Chairman and members of the Committee on the Judiciary of the United States Senate, I welcome this opportunity to speak on behalf of the National Bar Association regarding the critical issue of the nomination and appointment of Blacks to the federal bench.

The National Bar Association was founded in Des Moines, Iowa in 1925. It is the oldest and largest Bar Association of Black lawyers in the United States. Since its inception, the National Bar Association has been in the vanguard for justice for all. Many of its members were the legal giants who argued and won those landmark civil rights cases which gave meaning to "equal justice under the law."

Today, the struggle continues for the inclusion of Blacks in every aspect of the American life. And yet, as I appear before you, I find it unbelievable, but it is true, that during the Reagan presidency, 343 judges have been appointed to the federal juduciary. And only five of these appointments have been Black. (See Attachment A, Presidential Appointments of Black Federal Judges). Thus, the performance of the Reagan Administration in the appointment of Blacks is singularly abysmal. In contrast, former President Carter, during his administration, appointed 265 federal judges of whom 38 were Blacks. (See Attachment A).

Although the Constitution of the United States, has evolved from the point of specific exclusion of Blacks to the inclusion of Blacks within the letter of the law, we know that the real meaning of inclusion is not operative in the appointment of judges to the federal judiciary. President Reagan has had 343 opportunities to enhance the representativeness of the judiciary but has chosen to make his appointments a bastion of white males. It is the view of the NBA that it is crucial that the judiciary reflect the diversity of the American experience--for it is in this diversity that our nation garners its uniqueness and strength. This diversity can be achieved without sacrificing the quality of appointments. In my view, more ethnically and racially diverse appointments would add to rather than subtract from the overall quality of appointments.

The argument that there are few qualified Black lawyers is wanting and without substance. Just consider that in 1970, there were roughly 3,845 Black lawyers in the United States. Today, there are more than 22,000 black lawyers. The more than sixfold increase shows that there is an available pool of qualified Blacks from which to select judicial nominees. And so, the Reagan administration, if it were committed to an inclusive society and government, could do much to change the complexion and representativeness of the judiciary.

Throughout the Reagan Administration, the National Bar Association has requested of the Department of Justice that the National Bar Association be included as an active participant in the selection and investigation process of judicial nominees. (See Attachment B, Letter From National Bar Association to U.S.

Attorney General Edwin Meese, III). Such practice had been our experience in the years preceding the Reagan Administration. In fact, the National Bar Association would receive the names of potential nominees along with the American Bar Association and would have the opportunity to offer its views and insight. We were able to provide much needed insight and information bearing on the fitness of potential nominees for the federal judiciary.

For a moment, let me insert a brief comment about the District of Columbia Circuit. Some 14 judges have been appointed by President Reagan to the Circuit and District Courts here in the District of Columbia. The appointments have been all white males with no connection to the local Bar and/or community. Notwithstanding the view held by some that the D.C. Circuit is a "national court," there is absolutely no sound rationale to eliminate and discriminate against lawyers of the D.C. Bar for these appointments. The D.C. bar has over 35,000 lawyers, many of extraordinary distinction and experience. Moreover, the D.C. Circuit is situated in an area where the appointment of Blacks would make a significant statement for the federal judiciary. The Reagan Administration, therefore, must remove the imposed exclusion and discrimination against D.C Bar members for consideration for appointment to the D.C. Circuit.

The National Bar Association contends that it is imperative that the nation move with a strong commitment to include more Blacks, women and other minorities on the federal bench. The fabric of this nation will be strengthened by a federal judiciary which is representative of all the people.

In closing, we, Black Americans, have for too long borne the blunt and deadly blows of injustice embedded in the institutions of our nation charged with the administration and dispensation of justice. In this time of high technology and just after the bicentennial celebration of the United States Constitution, we Americans ought to be able to stand up and state, that the union is inclusive for all its citzens in every way. Certainly that is neither the case nor the direction of the Reagan Administration with respect to the appointment of Blacks, women and minorities to the federal bench.

We of the National Bar Association implore this committee to exercise fully its constitutional mandate of advice and consent in a manner that will send a clear signal to the White House that this is a government "of the people, for the people, and by the people." Therefore, the Reagan Administration needs to know that institutions of the government, including the judiciary, must give credence to our diversity as a nation.

Again, I thank you for this opportunity to express the view of the National Bar Association on this very important subject. I hope this Committee has better luck than the National Bar Association in encouraging this Administration to nominate more Black judges.

Attachment A

Presidential Appointments of Black Federal Judges

compiled by
Judge Edward B. Toles, Historian
Judicial Council of the National Bar Association

PRESIDENT FRANKLIN D. ROOSEVELT-		1933-1945
William H. Hastie *	Virgin Islands	1937
Herman E. Moore *	Virgin Islands	1939
PRESIDENT HARRY S. TRUMAN-		1945-1953
Irvin C. Mollison *	Customs Court	1945
Herman E. Moore (a) ***	Virgin Islands	1949
William H. Hastie * (former Chief Judge)	3rd Circuit Court of Appeals	1949
PRESIDENT DWIGHT D. EISENHOWER-		1953-1961
Scovel Richardson *	Customs Court	1957
Walter Gordon *	Virgin Islands	1958
PRESIDENT JOHN F. KENNEDY-		1961-1963
James B. Parsons (former Chief Judge now Senior Judge)	Illinois	1961
Wade H. McCree *	Michigan	1961
Thurgood Marshall **	2nd Circuit Court of Appeals	1961
PRESIDENT LYNDON B. JOHNSON-		1963-1969
A. Leon Higginbotham **	Pennsylvania	1964
Spottswood Robinson **	District of Columbia	1964
William B. Bryant (former Chief Judge)	District of Columbia	1965
Aubrey Robinson	District of Columbia	1966
Spottswood Robinson (Chief Judge)	DC Circuit Court of Appeals	1966
Constance B. Motley	New York	1966
Wade H. McCree *	6th Circuit Court of Appeals	1966
James L. Watson	Customs Court	1966
Thurgood Marshall	US Supreme Court	1967
Joseph C. Waddy *	District of Columbia	1967
Damon Keith ** (former Chief Judge)	Michigan	1967
PRESIDENT RICHARD M. NIXON-		1969-1974
Almeric Christian (Chief Judge)	Virgin Islands	1969
Barrington Parker	District of Columbia	1969
David Williams	California	1969
Clifford Scott Green	Pennsylvania	1971
Lawrence W. Pierce **	New York	1971
Robert L. Carter	New York	1972
Robert L. Duncan **	Military Court Appeals	1972
Robert L. Duncan	Ohio	1974

PRESIDENT GERALD R. FORD-		**1974-1977**
Henry Bramwell ***	New York	1974
Matthew Perry **	Military Court of Appeals	1976
George N. Leighton	Illinois	1976
Cecil F. Poole **	California	1976
PRESIDENT JIMMY CARTER-		**1977-1981**
United States Circuit Court of Appeals		
A. Leon Higginbotham (PA)	3rd Circuit	1978
Damon Keith (MI)	6th Circuit	1978
Theodore McMillian (MO)	8th Circuit	1978
Joseph W. Hatchett (FL)	11th Circuit	1979
Amalya A. Kearse (NY)	2nd Circuit	1979
J. Jerome Farris (WA)	9th Circuit	1979
Cecil F. Poole (CA)	9th Circuit	1979
Nathaniel R. Jones (OH)	6th Circuit	1979
Harry Edwards (MI)	DC Circuit	1979
United States District Court		
Almeric Christian (a) (Chief Judge)	Virgin Islands	1978
Robert F. Collins	Louisiana	1978
Jack E. Tanner	Washington	1978
Mary Johnson Lowe	New York	1978
Julian A. Cook, Jr.	Michigan	1978
Paul A. Simmons	Pennsylvania	1978
David S. Nelson	Massachusettes	1978
Joseph C. Howard	Maryland	1979
John G. Penn	District of Columbia	1979
Matthew J. Perry	South Carolina	1979
Benjamin F. Gibson	Michigan	1979
Gabrielle Kirk McDonald	Texas	1979
Anne E. Thompson	New Jersey	1979
Terry Hatter	California	1979
James Giles	Pennsylvania	1979
Horace T. Ward	Georgia	1979
Anna Diggs Taylor	Michigan	1979
Alcee L. Hastings	Florida	1979
Odell Horton	Tennessee	1979
U.W. Clemon	Alabama	1979
Myron H. Thompson	Alabama	1979
Consuela B. Marshall	California	1980
Thelton E. Henderson	California	1980
Norma H. Johnson	District of Columbia	1980
Clyde S. Cahill, Jr.	Missouri	1980
George Howard, Jr.	Arkansas	1980
Richard C. Erwin	North Carolina	1980
George White	Ohio	1980
Earl B. Gilliam	California	1980

Attachment B

NBA

August 26, 1985 Reply to: P.O. Box 239
Tuskegee, AL 36083

Fred D. Gray
President

Thomas J. Broome
President-Elect

Charles S. Johnson, III
Vice President

Thomas A. Duckenfield
Vice President

Walter L. Sutton, Jr.
Vice President

Joyce A. Gates Mitchell
Vice President

Algenita Scott Davis
Secretary

Frank Scales, Jr
Treasurer

John A. Turner, Jr.
General Counsel

David E. Neely
Parliamentarian

John Crump
Executive Director

The Honorable Edwin Meese, III.
Attorney General of the U.S.
U.S. Department of Justice
Washington, DC 20530

RE: The role of the National Bar Association regarding investigation of potential nominees for the federal courts

Dear Mr. Meese:

The National Bar Association is the oldest and largest Bar Association consisting primarily of Black attorneys in this nation. The Association was founded in 1925 when Black attorneys were excluded by both policy and practice from membership in the American Bar Association. We have been in existence continuously since 1925. I am currently serving as President of the Bar Association for the 1985-86 term.

This letter is a formal request to you on behalf of the NBA that the Department of Justice provide to us, for purposes of investigation, the names of potential nominees to the federal courts in the same manner as you do with the American Bar Association. We feel keenly our exclusion from the formal investigation process and would appreciate receiving the same courtesy and responses that are accorded to the ABA.

In the past, we have been formally included in the process. At the same time, the ABA received the names of potential nominees, those names were also forwarded to us by the Department of Justice. Our views and input were actively sought.

However, the practice of including us was discontinued during Mr. Reagan's first term, although we had expressly requested the Attorney General to continue to seek our views.

During Mr. Reagan's second term, we are now making this request of you. We believe we have insights and

-over-

NATIONAL BAR ASSOCIATION INC., 1773 T STREET, N.W., WASHINGTON, D.C. 20009 • (202) 797-9002
61st ANNUAL MEETING • JULY 27-AUGUST 2, 1986 • DENVER, CO.
Telex: 469510 Cable: NABAR WSH

The Honorable Edwin Meese, III
Attorney General of the U.S.
August 26, 1985
Page Two

information on potential nominees that the Department of Justice would welcome in making decisions about their fitness for the federal bench. It is our sincere hope that you will formally include the National Bar Association in the selection and investigation process.

Please notify me of your decision at the earliest practicable time at the address listed above.

Sincerely,

Fred D. Gray

Fred D. Gray, President
National Bar Association

FDG/rc

Senator **Kennedy**. Let me ask you this, Mr. Duckenfield. You have related to us your conversation with General Meese, and evidently, I gathered from that, that General Meese indicated to you that—what?—that they were not going to consult with you and your recommendations would not be considered?

Mr. **Duckenfield**. I was not a party to the meeting, but Fred Gray, then president of the National Bar Association, and the executive director, were in attendance at that meeting, and Mr. Meese made it clear that we would not be included in the process.

Senator **Kennedy**. You heard Mr. Markman this morning indicating that his door is always open, and that the administration is reaching out.

Do you know of any instance where you have made any recommendation?

Mr. **Duckenfield**. We have not made any recommendation because we feel that it would be an act of futility. I might say that Mr. Markman indicated that on occasions he had called the NBA regarding vacancies, but it would be an opportunity only for folly and futility, for the NBA to respond to a vacancy in Iowa or Idaho.

It would be much better for the Reagan administration to consult us with respect to vacancies in the Northeast and in the South, or the Midwest, where there are more blacks, but this has not been the case.

In reality, when they do come to us, the decision has been made.

Senator **Kennedy**. Ms. Rogers, has that been your experience as well?

Ms. **Rogers**. Well, frankly, Senator, after several tries—and it is not easy to find candidates who fit the profile that Mr. Markman gave me, actually—but after several tries, with no visible results, I found it rather discouraging, and have essentially stopped trying.

Senator **Kennedy**. And have they reached out to you, then? Have they been in touch with you for recommendations?

Ms. **Rogers**. No, that has not been the course of our relationship at all. The way it started was, that I met Mr. Markman at a public forum about a year ago, and I came into his office, at his invitation to meet, at which time he invited me to call him routinely, and I did call him from time to time after that, and he did return my phone calls, I must admit.

But he has never initiated the contact himself.

Senator **Kennedy**. Let me ask you, Judge Chirlin, why is it important that women be represented on the courts? An incredible question to have to ask, but evidently necessary to make the record.

Judge **Chirlin**. It seems to me that if you want—well, the underlying strength of the court system is the confidence that the people have in that court system.

We do not have the power that the Senate has. We do not have the power that the President has. What the courts rely on for their power is the confidence that the population has in them, so that the political bodies will know that they cannot—shall we say—mess around with the courts, or that they will respect the judgments that the courts make.

It is essential, in order to have that popular acceptance of what the courts do, that people who go into the courts on a daily basis see that the courts are representative, whether it is women, whether it is blacks. The idea of litigants, of jurors, of witnesses going in and seeing only white males, creates an impression that their views, their perspectives are not represented.

Senator KENNEDY. Do you have specific recommendations, even in the windup of this administration, about how, even in the current vacancies that are available to be filled, how the Administration could do better?

Judge CHIRLIN. That is a very difficult question because I think the record of the administration in this area has been such that qualified women are discouraged from applying, and as my experience with the Deukmejian administration in California tells, it took us 2 or 3 years to really prime the pump in terms of creating an impression that people were really interested in appointing women.

Individual Senators I think can have an impact by proposing names, and by creating the impression in the legal communities within their particular States, that they want to have women.

I do not hold a whole lot of hope out for the administration in this last year.

Senator KENNEDY. I want to thank all of you very much for your excellent testimony. We will include Senator Simon's statement in the record.

[The prepared statement of Senator Simon follows:]

Statement of Senator Paul Simon
Judicial Selection Process
Oversight Hearing
February 2, 1988

At the outset I would like to commend Chairman Biden for holding, and Senator Kennedy for chairing, this important hearing on the selection of federal judges.

Slightly less than a majority of the federal judiciary has now been appointed by President Reagan. These lifetime appointees will give meaning to the words of our Constitution and our laws well into the next century.

I have had an opportunity to scrutinize many of these individuals closely, since Chairman Biden (then the Ranking minority member) asked me to lead the Democratic nominations review effort in the 99th Congress, and to be a member of the Judicial Nominations Task Force in the 100th Congress. I have spoken at some length on the subject to the National Press Club in March, 1986 in an address called "Judging Judges", which I ask unanimous consent to make part of the hearing record.

Although the Senate has confirmed all but a handful of the President's nominees, there are three issues regarding judicial selection that concern me.

First is the issue of quality. Far too many nominees have received the ABA's low rating of "Qualified" -- applied to nominees with only minimally acceptable qualifications. This standard is too low for federal judges, who should represent the cream of the legal profession.

Second is the issue of ideology. President Reagan has candidly stated his intention to try to shape the substantive direction of our constitutional law by nominating judges who share his constitutional views, and who seem likely to decide cases in accordance with them. This is the President's prerogative, but he has used it to an unprecedented extent, excluding many better qualified candidates.

Third is the question of the diversity of the federal judiciary. Federal judges do more than dispense justice; they also symbolize justice. Recent past administrations have attempted to reach out to nominate qualified women, blacks, Hispanics, and Asians to the federal bench. The Reagan Administration has reversed this trend. In my first year on the Judiciary Committee, we reviewed 92 nominees (70 for district courts and 22 for the appellate level). Of the 70 district court nominees, five were women, two were black, three were Hispanic, and none were Asian. Among the 22 circuit nominees, three were women; not a single circuit judge was black, Hispanic, or Asian. Three years later, the record has not improved: of 380 federal judges nominated by President Reagan, 30 were women and 22 belonged to racial minorities. This record is particularly sorry because qualified women and minorities are routinely passed over in favor of less qualified nominees ideologically closer to the President.

Today's hearing is a welcome opportunity to review the process that has produced these problems. I look forward to the testimony of the witnesses.

JUDGING JUDGES

The Senate's Role in Judicial Appointments

by

U.S. SENATOR PAUL SIMON

National Press Club

March 10, 1986

The Senate's role in the appointment of federal judges is receiving more attention. Since the Senate has been involved in these appointments from the beginning of the Republic, this is obviously not a new question, but it presses today with special urgency. We are witnessing an enormous turnover on the federal bench; frankly, too much of a turnover. A majority of the Federal Judiciary will have changed membership during President Reagan's service in office—and on our most important court, the United States Supreme Court, a substantial turnover in membership is possible. Since federal judges are lifetime appointments, what is at stake in all these changes is the character of our judicial branch for a generation, and the real-world meaning of our Constitution and federal law.

I have concerns about the judicial nominations that have been made since I joined the Senate: I am concerned about their quality, and I am concerned about their ideological bent, and we in the Senate must think harder about how we can try to assure that judicial appointments are the best possible. I am especially concerned that we lay the groundwork now for considering future nominees to the Supreme Court—that we think about our standards and processes before people are nominated and before the debate turns to specific personalities. I hope that these remarks will begin to lay that groundwork.

● ● ● ● ●

I start with the general view that the Senate should play an active role in the appointment of federal judges. In contrast to Presidential nominations to executive departments, there should be no automatic presumption that the President gets the judges he wants. The Constitution provides that the President shall "nominate" people for the federal courts, but it also provides that the Senate must give its "advise and consent" to any appointment. I have recently reread the relevant records surrounding the adoption of this provision at the Constitutional Convention, and they are instructive. Far from supporting any idea that the President essentially controls judicial appointments, they clearly establish that the Framers expected the Senate to be an active partner in the appointment process. The Convention records establish that the current provision was a compromise between those who wanted judicial appointments solely in the hands of the Senate—the prevailing position until the end of the Convention—and those who thought the President should have a greater role. By tradition the Senate has played a prominent role in the district court nominations when the Senator or Senators are of the same political party as the President. But nominees for the Circuit Court of Appeals have by recent tradition had significantly less Senate input.

There is a reason judicial nominees should receive the special scrutiny of the Senate. In contrast to the President's nominations to positions within his own executive branch, appointments to the judiciary are to a branch of government that is supposed to be independent of the President and for a duration exceeding his own term of office. For the President to control such appointments unilaterally would be inappropriate, especially in a political system where checks and balances are so important. The Senate is an institution in some ways not as broadly representative as it should be; we have only two women; there are no blacks; no Hispanics. But the Senate is broadly representative of the country's political diversity. It does not defer to the President when it thinks his proposed budget or legislation will be bad for the country, and the same should be true with respect to his judicial nominees. While the law is more likely to have national impact than most judicial nominees, the law usually can be changed with greater ease than you can change judges. Taken as a whole, the federal court system is another institution that is not as broadly representative as it should be. Under the Reagan Administration the representation of women and minorities in the judicial branch has worsened. In my first year on the Judiciary Committee, we reviewed 92 nominees; 70 for district courts and 22 for the appellate level. Of the 70 district nominees, five were women, two were black, three were Hispanic, and none were Asian. Among the 22 circuit nominees, three were women. Not a single circuit judge nominee was either black, Hispanic, or Asian. The impact of federal judges is so enduring that we cannot view approval of these appointees as a clerical or routine duty of the Senate.

ABOVE ALL: QUALITY

Given that basic perspective, what criteria should the Senate use in evaluating judicial nominees as part of its advise and consent role? A central feature of the Senate's role must be to evaluate the nominees' quality. By "quality" I mean several things. First, we must be concerned about a nominee's professional competence, which includes intellectual capacity and legal skills, as well as the nominee's experience—a factor which bears on the nominee's practical wisdom about people and the world as well as more narrow professional skills. Second, we must be concerned about the nominee's integrity and moral character. Third, we must be concerned about the nominee's temperament: his or her openmindedness, judgment, evenhanded consistency, and sense of fair play.

Few, if any, of my Senate colleagues would disagree in the abstract with the notion that the Senate should evaluate "'quality" factors. But we need to be more demanding than we have been in actually insisting that nominees be of high quality. The American Bar Association's Standing Committee on the Federal Judiciary uses four categories to rate nominees: Exceptionally Well Qualified, Well Qualified, Qualified, and Not Qualified. The next-to-the-bottom rating, "Qualified," in fact applied to nominees with only minimally acceptable qualifications. Since I have been on the Senate Judiciary Committee, a full 50 percent of U.S. Court of Appeals nominees—controlled entirely by the Administration—have received only this "Qualified" rating. About three-fourths of these were found "Not Qualified" by a minority of the ABA Committee. During this same period, 48.6 percent of the District Court nominees—for which Senators often play a key role— also received only a "Qualified" rating, of whom approximately 20 percent were found "Not Qualified" by a minority of the ABA Committee.

These numbers are disturbing. For years, my image of federal judges was of those who are really stellar members of the bar. That image, unfortunately, is changing, for me and for many others. Those appointed to our federal bench for life should be the best the legal profession has to offer. Too many clearly are not. Federal judges resolve matters that are of extraordinary importance not only to individual litigants but to the country as a whole. Their work is complex, and, as we are so often reminded, court dockets are extremely heavy. Competence and efficiency, along with wisdom, are absolutely essential job requirements. I know the contending political forces that can surround judicial nominations, but the plain fact is that the job of a federal judge is so important today that our country cannot afford nominees of borderline qualifications; we need the best. When we lower standards, we lower the prestige of the bench, and when that is lowered the desirability to serve for the really fine minds and experienced barristers wanes. It is a downward spiral we are on, and we must inaugurate an upward spiral. Having said that, it is still true that federal judgeships remain among the most honored and sought-after positions in American life; we need not settle for borderline qualifications. We can have the best, if only we have the will to insist upon it. This we have not done.

A more difficult question is whether Senators should limit themselves to these matters of professional quality or should also consider nominees' substantive legal views, particularly their views about the meaning of the Constitution and the role of federal courts. This may be the most significant issue about the confirmation process facing a Senator today—and it has broad implications for the judiciary and for the country. President Reagan has candidly stated his intention to try to shape the substantive direction of our constitutional law by nominating judges who share his constitutional views, and who seem likely to decide cases in accordance with them. Like many others, I have become troubled by the ideological bent of the President's nominees; so it becomes important to know in what situations, if any, a Senator should withhold "consent" to a judicial nomination because of disagreement with the nominee's legal views.

My thoughts on this difficult issue, I acknowledge, are still evolving, and I am not here today to announce definitive answers. What I want to do instead is offer some comments and raise some questions with the goal of inviting the broader debate on this subject that is needed.

I see three separate aspects to this issue that should be kept somewhat distinct.

(1) Are a nominee's substantive legal
views altogether irrelevant to the
Senate's confirmation decision?

(2) If not, what standard should a Senator
use in evaluating a nominee's views?

(3) In light of the standard, how should a
Senator go about finding out what a nominee's
views are—in particular, what
can a Senator properly ask a nominee?

NOMINEES' LEGAL VIEWS

You often see reference to the supposedly conventional wisdom that a nominee's legal views should be altogether irrelevant to the Senate's confirmation decision. In actuality, though, it is hard to believe that many people really believe this as an absolute, since most Senators would probably vote against a nominee who believed that racial apartheid would be constitutional or who held similarly outlandish views. In fact, the so-called conventional wisdom has not actually been the convention. Time and again over the past two centuries, Senators have voted against judicial nominees whose views they deemed unacceptable. Examples of this span as far back as the Senate's rejection of John Rutledge's nomination by George Washington as Chief Justice in 1795, and include such recent examples as the Senate's rejection of G. Harold Carswell's nomination to the Supreme Court in 1969, a rejection based on "quality" grounds and on the fact that his segregationist views on civil rights matters were deemed unacceptable.

But there are two fundamental reasons that nominees' legal views should not be altogether off-limits to the Senate. One is that just as we know that a nominee's competence and integrity will affect his views as a judge, we know that the nominee's individual views about legal matters will in some measure affect decisions the nominee makes as a judge. The reason is that judges inevitably have leeway. They must fill in gaps in the law and must resolve ambiguities about what the law is, and in doing so a judge inevitably draws upon his or her starting point views and outlook. This is true of all judges, and it is especially true of Supreme Court Justices, whose leeway in giving meaning to the majestic general commands of the Constitution is particularly great, and who must resolve conflicts among lower courts on a daily basis. A Senator who considers only whether a judicial nominee will "follow the law" is ignoring the fact that the law to be followed is often not clear, and that judicial decisions are often affected by a judge's individual legal views. To contend that a Senator may not properly consider those views amounts to a contention that things highly relevant to the job—things that make a good or bad judge—may not be considered. Here we must remind ourselves that the constitutional mandate for the Senate is to "advise and consent," not merely to consent. How should we fulfill that advising role in the case of federal judicial nominees?

A second reason a nominee's views may be relevant to the current Senate is that they were relevant to the President's own decision to nominate. As an active partner in the judicial appointment process, as the authority that must "advise and consent" to nominations in our system of checks and balances, should the Senate evaluate any factor the President does? And if the President is trying to shape future judicial decisions by self-consciously nominating people with particular legal views, should the Senate—at least to some extent—consider whether those views are appropriate ones and good for the country?

But if a nominee's legal views should not be altogether irrelevant to the Senate, what standard should a Senator use in evaluating a nominee's views? This, for me, is the harder question. The choice, as I see it, is between two basic possibilities.

One is for a Senator only to determine whether the nominee's views are within the outer boundaries of reasonableness. Under this standard, a Senator would disapprove only those nominees holding unreasonably extreme views—for example, nominees who think *Brown v. Board of Education* was wrongly decided. Different Senators, of course, would place the boundary of reasonableness at different places. But, under this standard, the Senator would be willing to approve any nominee holding views within some broadly defined "'reasonable" range, even if the Senator thought those views to be wrong and bad for the country. And this suggests a problem with this standard: it allows this President or any President to systematically appoint people whose views fall at one end within the broadly tolerable range, even though that unilateral Presidential action could have serious consequences for the country. Why should the Senate acquiesce in this deliberate skewing of our judges and our fundamental law?

An alternative standard is more comprehensive and demanding: Are the nominees' views about the meaning of the Constitution and the role of federal courts views which, at least in their broad outlines, the Senator believes are correct ones? What are the nominee's views on key elements: majority and minority rights, presidential and congressional authority, federal power and state and local authority, and the meaning of the First Amendment? These standards, of course, could not mean that a Senator would actually vote against every nominee with whom the Senator disagrees. If a President tries to appoint too many judges whose ideological slant a Senator opposes, political compromise on both sides would be necessary to avoid deadlock. Moreover, a Senator might choose to apply this standard only in limited situations—for example, where the nominee's other qualifications are borderline. The danger in applying a more ideological standard is that the Senate should not be the abuser of ideological rigidities any more than the President should be. Some of those who criticize the rigidities of right-wing ideology would impose rigidities of the left. Both rigidities should be rejected.

Whatever standard is used, each Senator has to decide for himself or herself which particular matters are most relevant in deciding whether the nominee's views are acceptable. And the question of what is relevant to each Senator is related to the final issue: How should a Senator go about learning what the nominee's relevant views really are?

WHAT YARDSTICKS?

The easiest sources are those in the public record—the nominee's prior judicial opinions, articles, speeches and statements. The more difficult issue is what questions a Senator may properly ask nominees about their views.

Asking a nominee's general views about the Constitution and constitutional interpretation is clearly appropriate. Judicial nominees should all demonstrate their understanding that our constitutional system not only gives scope to majority rule but also guarantees minority and individual rights; that federal courts have traditionally played a critical role in protecting those rights. Middle-range questions—for example, asking the nominee, ''How do you assess the legacy of the Warren Court?''—can also uncover relevant information without being objectionable. And the same is true of general questions concerning particular provisions of the Constitution—for example, asking the nominee, ''What do you think the Establishment Clause means?''

The problem with these relatively general questions is that they can easily generate responses that are unhelpfully fuzzy or cliched. To get answers that provide more useful information, a Senator may be inclined to ask more specific questions. But specific questions can pose more sensitive problems. For example, asking how a nominee would decide some pending or future issue improperly puts the nominee in a compromised position, even though it may well seek relevant information. These future-oriented questions ask the nominee to prejudge a matter that might come before him or her as a judge and to give an ''advisory opinion'' abstracted from concrete facts. These questions also create the unseemly appearance that a binding commitment about certain future cases is a quid pro quo for Senate confirmation. Such questions should be avoided.

Specific questions about prior cases or about specific issues already decided by the courts do not necessarily pose these problems, but they suggest difficulties of their own. For example, to use a nominee's views on any other single issue as a ''litmus test'' ordinarily would be unfair and inappropriate, and is an unreliable way to predict the nominee's overall future performance. Specifics should be probed to provide illustrations of the nominee's views about the enduring great themes of American law—federalism, free speech, equal protection, separation of powers—but not as a checklist for special-interest groups. It does not seem inappropriate to question a nominee as to his or her understanding and commitment to the First Amendment. Or what does the phrase ''cruel and unusual punishment'' mean to the nominee? Or what is there in the nominee's background to suggest that there is some sensitivity to minorities so that the Equal Protection clause will have real meaning to that person?

There is much to be said for a rather comprehensive Senate consideration of nominees' views when the President is considering them, particularly the views of nominees to the Supreme Court and the U.S. Circuit Court of Appeals. But we should have a fuller public debate, addressing the full range of possible objections and concerns, including those that I can mention here only briefly. I hope these remarks will help inaugurate this fuller public discussion.

Some have already objected to questioning nominees about issues, because, they say, this path would be a new one for the Senate, and they are uneasy for that reason. Even if that objection were factually accurate, it needs to be evaluated in light of the way the President is systematically making ideological nominations, moreso than any President since Franklin D. Roosevelt.

Another concern is that a more active Senate role will produce confrontation and deadlock. But this body, which is accustomed to working out practical compromises, can work out compromises with the President in such a way that the quality of the federal judiciary will not be reduced.

Another possible objection, this one from members of my own party, is that Democrats will be hurt by an active Senate role when we recapture the White House. It is true a Senate that restrains a Republican President from making appointments that are too ideological or lacking in quality will also restrain a Democratic President from doing that. But we should welcome that restraint. It will both improve the quality of the judiciary and keep the law from being some huge pendulum, swinging whichever way the current political winds blow. There should be a stability and certitude in the law, and ideological swings erode that. In the Federalist Papers, Alexander Hamilton describes the Senate's role as being "an efficacious source of stability." A President will be thwarted only when he holds significantly more extreme views than the Senate, and seeks to use judicial appointments to impose those views.

And, finally, we need to consider whether an active Senate role will make the appointments process more political and ideological, thereby undercutting the courts' authority and stature. The Senate's willingness to play a more active role may, in fact, be the best strategy for ultimately reducing the role of ideology in the process. That is particularly needed for nominees to the circuit court and the Supreme Court. Senate passivity itself can allow the law to become that pendulum swinging back and forth, simply following ideological changes at the White House. The Senate's willingness to counter the President's nominations that are too ideological could well induce the President to propose fewer such nominees. The Senate's failure to play that role leaves today's appointments process ideological, but solely on the President's terms.

To more effectively evaluate all of this, I have discussed with Senator Joseph Biden, the ranking Democrat on the Judiciary Committee, the possibility of asking our distinguished colleague from South Carolina who heads the Judiciary Committee, Senator Strom Thurmond, that hearings be held on the fundamental questions: What should the role of the Senate be in judicial nominations? There is an implied subsidiary question: How can we through this process improve the quality of the nominations? And we should ask: What is the role of this Administration in the nomination process, and how does that compare to previous administrations?

If we should make such a request and it is not granted, we could hold our own independent ad hoc hearings on this important issue. Congress plays another role in the quality of the judiciary. The pay for federal judges is not adequate. It is good enough for mediocre judges, and if that is our goal, the pay scale helps achieve it. Our goal obviously should be significantly different. But within the present pay framework, there still could be a marked improvement in the quality of appointments to the federal bench.

• • • • •

I have spoken mostly of the Senate's role in the appointment process, but the Senate is only the final step. Excellence in judicial appointments requires that every institution involved in the process play its role as well as possible. So before closing, I want to comment on two other institutions in particular.

OUTSIDE SCREENING

The first is the American Bar Association. The Standing Committee on the Federal Judiciary of the American Bar Association has been consulted with respect to most federal judicial appointments since 1952. All who have worked with the Committee are appreciative of the service it performs in evaluating the qualifications of potential appointees, frequently on relatively short notice. I recognize the concerns that some have expressed about a private entity playing a consulting role in the appointments process, but long experience has shown the ABA Committee to be a valuable and constructive force. But, the ABA's screening should be strengthened and the standards raised. The ABA Committee should take pains to consult a broad range of groups, reflecting the full diversity of outlook within the legal profession, but that will be a less than completely useful gesture if something else does not happen. Politicians are not known for their courage, and unfortunately neither are lawyers. When asked their opinions of Joe Smith, a nominee for a district judgeship, I am told the prevailing practice is to be generous, not to a fault, but to all faults. The lawyer thinks, "Joe may sit on one of my cases. I'll play it safe." What the lawyer should be thinking is, "Joe may sit on one of my cases. I ought to make sure that the presiding judge in that case is a really superior legal mind with a great sense of balance and perspective." It has often been said but it bears repeating: Lawyers owe more to the law than simply using it as a tool to make a living. The ABA Committee is approving too many judges it should not be approving. The Bar needs more backbone and higher standards.

Screening by the Bar Association should apply to the question of quality, ordinarily not to the views of the nominee. I leave that judgment to an administration and the Senate. Modifications in the ABA Committee's rating system would be helpful. For a nominee to carry the ABA Committee with two more votes as "Qualified" than

"Not Qualified," and then come with a favorable rating to the Judiciary Committee is for the Bar Association to participate in creating more and more mediocre judges. That is neither desirable nor necessary. But it is happening. A gradual lowering of the quality of the Federal Judiciary is in no one's interest. The ABA also should give us a specific recommendation that a judge should be approved or not approved. It could be argued that when the ABA tells us that a person received a "Qualified" rating but that there were votes for "Not Qualified," that is what we are being told. Those of us who are Senators need more than oblique hints about what we should do. The ABA should tell us bluntly. That removes partisan taint from actions of the Committee. And I should add that other organizations, such as the American Civil Liberties Union and Common Cause that express great interest in and concern for the quality of the judiciary, might soil their hands a little by taking the most simple, fundamental step of telling members of the Senate whether they believe a nominee should be approved or not approved. But the ABA should lead the way on this.

The other institution I am concerned about is the Department of Justice, which plays such a major role in reocommending nominations to the President. There is an old saying at the Department of Justice that the Department wins a case whenever justice is done. That wonderful saying reminds us that the cause of justice requires a commitment to values that transcend mere partisan advantage. I wish that a similar attitude always governed the Department's approach to judicial nominations. When Edward Levi was Attorney General under President Gerald Ford, we saw an approach worth emulating: A Department of Justice that recommended judicial nominees based primarily on professional excellence rather than ideological purity or partisan advantage. That is the best route for the Justice Department and President to follow. And if they follow this "advise," at least one Senator would "consent" to their nominations enthusiastically.

◆

Senator **Kennedy**. The way we are going to proceed is, I have a meeting that I just cannot avoid at this time, and so we will recess until 12:30, and then we will hear the last panel at 12:30. I apologize to the witnesses but it is unavoidable.

So we will recess, now, until 12:30. I will try and get back a little earlier than that. We will include all of the statements in the record, so that they are a part of the record, and that they stand by those complete statements. I apologize to the witnesses.

Judge **Chirlin**. Senator.

Senator **Kennedy**. Yes?

Judge **Chirlin**. May I, since I got a recent invitation to come, and I wrote my remarks while sandwiched between Redskin fans on the plane——

Senator **Kennedy**. Yes. You know, we never do that sort of thing, of revising the record. [Laughter.]

Judge **Chirlin**. I would like to send it in, if I may.

Senator **Kennedy**. It will be included. I thought it was very eloquent, the way it was given, and you can make whatever changes, adjustments, or elaborations, continuances, whatever way you want to.

[Prepared statement follows:]

TESTIMONY OF JUDITH C. CHIRLIN
BEFORE
SENATE JUDICIARY COMMITTEE
FEBRUARY 2, 1988

Thank you, Senator

The NAWJ appreciates your invitation to address this committee on a subject of such critical importance to our members, to the fairness of our justice system and to the perception in communities across the land that our courts are fair and representative of all of our citizens.

The NAWJ is composed of approximately 800 judges (mostly women) of state and federal courts of all levels. I am Chair of Judicial Appointments Committee. I am also a Republican, appointed to the Los Angeles County Superior Court by Governor George Deukmejian, a Republican.

We applaud the committee's interest in the subject of minority appointments to the federal bench, because - as we all know - in order for our courts to fulfill their time honored role as protectors of the constitution and the rights and responsibilities guaranteed therein, they must not only interpret and apply the law correctly, but they must do it in a fashion that projects the appearance of fairness, equality and justice.

The record of appointment of women judges to the federal courts over the past 7 years is lamentable. Only 8.4% of the appointees to the U.S. District Courts have been women - and in the last year that percentage has dropped to 5.4%. That is as compared to 15.5% for the Carter Administration - and comes at a time when the demographics of the legal profession suggest that the percentages should be going up - not down. (I should comment that while I speak with reference only to women, everything I say applies equally to racial and ethnic minorities as well).

I should point out also that this is not a partisan issue, nor is it a matter of judicial philosophy. Women come in all sizes, shapes, and colors; of different parties and different political and judicial philosophies - just like men.

Nor is this a matter of our asking Senators to propose, the President to appoint, or the Senate to confirm unqualified candidates - just because they happen to be women. (In fact I think it is insulting to any minority group to suggest that in order to appoint members of their group, you must sacrifice quality standards.)

In point of fact there are women of all political parties and judicial philosophies around the country who are exceptionally well qualified for appointment to the federal bench.

So why is the recent record so poor?

First, we have an administration that articulates a valid gender-neutral policy (that is, that they will evaluate candidates without regard to their sex or ethnicity) but applies that policy in an atmosphere where their record on appointments of women judges, and public comments of some present and former members of the administration, create the perception within the women's legal community that they are not interested in appointing women judges. Women are not motivated or encouraged to apply and the record gets worse.

Second, individual Senators - in recommending candidates to the President - are content to draw judicial candidates from the legal or political "old boys network" within their states - from which women traditionally and historically have been excluded.

Third, the Senate Judiciary Committee has, to my knowledge, declined to use its power in giving advice and consent, to say to a recalcitrant administration that we are not going to confirm judicial candidates until we start seeing more womens names.

What needs to be done?

The President and Members of the Senate must take the responsibility to make sure that women know that they sincerely want to appoint qualified women to the bench.

Where there is an atmosphere where qualified women are motivated to apply - because they understand that the President and Senators are genuinely interested in appointing them;

Where they know that the President and Senators do not assume that because of a woman's anatomy she embraces certain political or judicial philosophies;

Where they know that the President and Senators will not assume that because she's not "one of the boys" she's not capable of doing quality judicial work;

Then will you get qualified women to apply in any appreciable numbers and then, and only then, if you apply gender neutral standards in evaluating candidates, will there be an acceptable record in appointing women judges.

Is there proof of this?

Let's look at California -- On the federal level, President Reagan has appointed 3 women to the District Court - Central District and one woman to the 9th Circuit.

Why?

Because Senator Wilson's recruitment/screening committee has let it be known that the Senator is genuinely interested in proposing the names of qualified women to the President.

Right now, one of the (we hope) leading candidates for an opening on the District Court - Northern District is a woman who applied because Senator Wilson's people contacted NAWJ and California Women Lawyers to seek our help in identifying a qualified woman who would meet his criteria.

And on the State level, the experience is even more interesting and instructive. When George Deukmejian - a Republican - became Governor, the women lawyers of our state expected little and our expectations were met. After the first year in office, only 8 of the Governor's 85 appointments went to women.

On behalf of California Women Lawyers, I spoke with the Governor's Appointments Secretary, Marvin Baxter, regularly. He repeatedly told me - in response to my comments about the small number of women appointees - that there were very few female applicants.

CWL canvassed the state - I personally spoke individually to over 75 women - and we came to the conclusion that while many women were interested in judicial careers, there was a widespread perception within the women's legal community that the Governor wasn't interested in appointing women. After we discussed that conclusion with his staff, the governor asked our help in combatting that perception.

We arranged for Mr. Baxter to be invited to speak before various local women's bar groups - to date, he and I have done what has become known informally around the State as the "Marv and Judy Show" before some 20 or so women's and other minority or local bar groups. At those programs we explain the process and the politics of getting a judgships - and encourage qualified candidates to apply.

The result has been a dramatic increase in the number of women applicants, and then - because the Governor truly applies gender neutral standards in evaluating all candidates - there has been a dramatic increase in the number of women appointed. From 1983 and 1984, when the numbers were 8 and 7 respectively, the figures have shot up to 23, 20 and 23 for 1985, 86 and 87, or a total of 81 women appointed.

But there are other numbers that are more significant:

Thru January 27 of this year, Governor Deukmejian has appointed 559 judges:

Of the total pool of male applicants of 2154, 478 have been appointed - 22% of the pool.

Of 352 female applicants, 81 have been appointed - 23% of the pool.

Of 2270 caucasian applicants, 498 (or 22% of the pool) have been appointed.

Of 96 hispanic applicants, 26 (27% of the pool) have been appointed

Of 83 black applicants, 17 (or 20% of the pool) have been appointed.

Of 57 asian applicants, 18 (or 32% of the pool) have been appointed.

These figures show that when you create an atmosphere where all people know that they will be fairly and equitably treated, and then you evaluate them using the same quality standards for all candidates - without regard to irrelevant criteria such as race or sex - the appointments will come in all shapes, sizes and colors and will result in a strong and heterogenius judiciary.

We urge the administration and individual Senators to seek out and encourage qualified women to apply, to fairly evaluate them, and to appoint them.

We urge this committee to use its power of confirmation to assure that a fair and representative number of the judges confirmed are women and minorities.

We, at NAWJ, and the women's bar groups in every state with which we work stand ready to help the President, any individual Senator and this committee in the quest to bring fairness and equity to the appointment of federal judges.

JCC:sk

Judge **Chirlin**. Thank you, Senator.

Senator **Kennedy**. We will recess now.

[Brief recess.]

Senator **Kennedy**. We will come back to order, again.

I extend my apologies to the panel. It was just necessary to make that meeting.

Our second panel consists of four very distinguished witnesses to tell us about the situation here in the District of Columbia.

Wiley Branton, the first witness, is currently a partner in the firm of Sidley and Austin here, in Washington, and is Chair of the D.C. Judicial Nomination Commission, but is testifying today as a private citizen. Mr. Branton was previously dean of the Howard University Law School, and has been active in the cause of equal justice throughout his career.

Among his many accomplishments, Mr. Branton was the chief lawyer for the plaintiffs in the celebrated Little Rock school desegregation case. We are glad to see you here, again.

Mr. **Branton**. Thank you, Mr. Chairman.

Senator **Kennedy**. We also have Mr. Robert Jordan, president of the District of Columbia Bar, and a member of the law firm of Steptoe and Johnson. We are glad to have you as well.

Mr. **Jordan**. Thank you, Senator.

Senator **Kennedy**. Third, Ms. Martha Saenz-Schroeder, a practitioner of immigration law here, in Washington, and president of the Women's Bar Association of the District of Columbia. We are pleased to have you here today.

Ms. **Saenz-Schroeder**. Thank you.

Senator **Kennedy**. I have been watching you during the course of the hearing nodding and shaking your head during the previous panel's testimony.

And, finally, Mr. Iverson Mitchell is past president of the Washington Bar Association. Thank you very much for joining with us here today.

Mr. **Mitchell**. Thank you, Senator.

Senator **Kennedy**. All right. We will start off with Mr. Branton.

STATEMENTS OF A PANEL CONSISTING OF WILEY A. BRANTON, PARTNER, SIDLEY & AUSTIN, WASHINGTON, DC; ROBERT E. JORDAN III, PRESIDENT, DISTRICT OF COLUMBIA BAR; MARTHA SAENZ-SCHROEDER, PRESIDENT, WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA; IVERSON O. MITCHELL III, PAST PRESIDENT, WASHINGTON BAR ASSOCIATION

Mr. **Branton**. Mr. Chairman, I have a prepared statement which I would like to submit. The first page is really talking about my involvement in legal affairs, primarily in this community, just to show my familiarity with lawyers in Washington.

You have stated that pretty much. I would simply add that I am a very active member of the District of Columbia Bar Association, the Washington Bar Association, the Bar Association of the District of Columbia, the Washington Lawyers' Committee for Civil Rights Under Law, and I am very active in the programs of the American Bar Association.

I have been a member of the Judicial Nomination Commission of the District of Columbia for the past 7 years, and have served as chairman of the Commission for the past 4 years.

I speak today, however, in my private capacity. This is a seven-member commission, which has the responsibility of recommending to the President of the United States, the names of three persons for his consideration in selecting a single nominee for each judicial position in the District of Columbia courts.

I might depart from my prepared text just to say, that in all of these years that I have been chairman, the Justice Department has never made any inquiry of us regarding persons who ought to be considered either for the U.S. District Court, or for the U.S. Court of Appeals, notwithstanding the fact that we give them a larger list of qualified people from which they select the Superior Court nominees.

In my capacity as a member and chairman of the commission, I have become very familiar with the many lawyers who have applied for judicial appointment, the judges who currently serve on the District of Columbia courts, and the highly qualified lawyers who have been recommended by others for possible judicial appointment, including those who decline to seek appointment.

There are 51 judges on the Superior Court of the District of Columbia, all of whom must meet the same basic requirements for appointment as that required of U.S. District Judges.

In my opinion, approximately 70 percent of the active judges presently sitting on the superior court are worthy of serious consideration for appointment to the U.S. District Court for the District of Columbia.

Many of them are good candidates for the U.S. Court of Appeals for the District of Columbia. Among this group are 18 black male judges, 3 black female judges, and 8 white female judges, any of whom would be good candidates for appointment to the Federal bench.

On the District of Columbia Court of Appeals there are four black judges, including two females, who are worthy for consideration for appointment to the Federal bench.

The judicial nomination commission has information on a large number of female and minority lawyers who are interested in seeking judicial appointment, and, in my opinion, are well-qualified for appointment to the Federal District Court as well as to the U.S. Court of Appeals for the District of Columbia.

By statute our commission can only recommend lawyers who are residents of the District of Columbia for these local judgeships. There is an even larger pool of highly qualified lawyers who practice in the District of Columbia, but who reside in the suburban areas of Washington, DC.

The facts are that there are many minority and female lawyers, and judges, who are highly qualified for appointment to both the U.S. District Court as well as to the U.S. Court of Appeals for the District of Columbia.

I would like to submit my full statement for the record.

Senator **Kennedy**. The statement will be so included.

[The prepared statement of Mr. Branton and response to questions follows:]

Remarks of Wiley A. Branton, Esq. Before the Senate Judiciary Committee

February 2, 1988

Regarding the Available Pool of Women and Minorities for Judicial Appointment in the District of Columbia

Mr. Chairman and Members of the Committee:

My name is Wiley A. Branton, a resident of 1611 Tamarack Street, N.W., Washington, D.C. 20012, and I am a member of the bar of the District of Columbia. I have been a lawyer for more than 35 years and have resided in the District of Columbia continuously for more than 22 years, during which time I have had an opportunity to meet and know a large number of lawyers who practice in the District of Columbia.

I am presently a partner in the firm of Sidley & Austin, where I have been for the past four years. For six years immediately preceding my present employment, I was Dean of the School of Law at Howard University. I was a partner in the firm of Dolphin, Branton, Stafford & Webber for seven years prior to becoming a law school dean. Prior to that, I held a number of law-related positions, including serving as Special Assistant to the Attorney General of the United States and Director of the United Planning Organization. In the latter position, I had general supervision for a while over the neighborhood legal services program until such time as we made that program an independent agency. This background information is being stated to show my familiarity with the legal profession in the District of Columbia. I am an active member of the District of Columbia Bar Association, the Washington Bar Association, the Bar Association of the District of Columbia and the Washington Lawyers Committee for Civil Rights Under Law.

I have been a member of the Judicial Nomination Commission of the District of Columbia for the past seven years and have served as Chairman of the Commission for the past four years. I speak today, however, in my private capacity. This is a seven-member Commission which has the responsibility of recommending to the President of the United States the names of three persons for his consideration in selecting a single nominee for each judicial position in the District of Columbia courts. In my capacity as a Member and Chairman of the Commission, I have become very familiar with the many lawyers who have applied for judicial appointment, the judges who currently serve on the District of Columbia Courts, and the highly qualified lawyers who have been recommended by others for possible judicial appointment.

There are 51 judges on the Superior Court of the District of Columbia, all of whom must meet the same basic requirements for appointment as that required of United States district judges. In my opinion, approximately 70% of the active judges presently sitting on the Superior Court are worthy of serious consideration for appointment to the United States District Court for the District of Columbia. Many of them are good candidates for the United States Court of Appeals for the District of Columbia. Among this group are 18 black male judges, 3 black female judges and 8 white female judges, any of whom would be good candidates for appointment to the federal bench. On the District of Columbia Court of Appeals, there are 4 black judges, including 2 females, who are worthy for consideration for appointment to the federal bench.

The Judicial Nomination Commission has information on a large number of female and minority lawyers who are interested in seeking judicial appointment and, in my opinion, are well qualified for appointment to the federal district court, as well as to the United States Court of Appeals for the District of Columbia. By statute, our Commission can only recommend lawyers who are residents of the District of Columbia. There is an even larger pool of highly qualified lawyers who practice in the District of Columbia, but reside in the suburban areas of Washington, D.C. The facts are that there are many minority and female lawyers and judges who are highly qualified for appointment to both the United States District Court, as well as to the United States Court of Appeals for the District of Columbia Circuit.

DISTRICT OF COLUMBIA
JUDICIAL NOMINATION COMMISSION

CHAIRMAN
1722 EYE STREET N.W.
WASHINGTON D.C. 20006
(202) 429-4076

February 12, 1988

The Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator Biden:

In response to your letter of February 8, 1988, I enclose herewith my answers to the questions submitted by Senator Charles E. Grassley, in connection with your February 2nd hearing on the judicial selection process. I am sending a copy of this letter and my answers to Senator Grassley.

Sincerely,

Wiley A. Branton

WAB:lwj
Enclosure

cc: Honorable Charles E. Grassley

ANSWERS BY WILEY A. BRANTON
TO QUESTIONS SUBMITTED BY SENATOR CHARLES E. GRASSLEY

1a Question: How many lawyers does Sidley & Austin employ in its various locations?

1a Answer:

I did not appear on behalf of Sidley & Austin and am not the proper person to answer the question. It is my understanding that Sidley & Austin has approximately 600 to 650 lawyers in its various locations, with approximately 60% to 65% of the lawyers based in Chicago. There are approximately 90 lawyers in the Washington office.

1b Question: How many partners at Sidley & Austin are women? For each woman partner, please provide the date when partner status was conferred.

1b Answer:

In the Washington office, there are 40 partners, including 2 women. One of the women was made partner in about 1982 and the other was hired as a partner in 1986.

1c Question: How many partners at Sidley & Austin are black (or other racial minority)? For each black (or other racial minority) partner, please provide the date when partner status was conferred.

1c Answer:

There are 4 black partners in the Washington office. Two of them made partner in about 1982, one in 1984 and one as of January 1, 1988. Another black lawyer who made partner prior to 1982 left voluntarily in 1987 to become a partner in another law firm.

Senator KENNEDY. Mr. Jordan.

STATEMENT OF ROBERT E. JORDAN III, PRESIDENT, DISTRICT OF COLUMBIA BAR

Mr. JORDAN. Thank you, Mr. Chairman.

As you indicated, I am currently president of the District of Columbia Bar which is a mandatory or unified bar composed of all of those who are licensed to practice law under the jurisdiction of the District of Columbia Court of Appeals.

This is the fourth largest bar group in the United States, and because of its mandatory nature, it is the largest bar group in the District of Columbia.

This is not the first time a representative of our bar has appeared to express views before this committee on the subject of Federal judicial appointments.

My predecessor, Paul Friedman, was up here a couple of times in October 1986 and April 1987, and other presidents of the bar were here in earlier years.

We are very appreciative of the fact that this committee continues to solicit the views of our bar on what we think is a very important subject.

The quality of the Federal judiciary, both here, in the District of Columbia, and throughout the country, is obviously important.

We think it is also obviously important that opportunities for appointment to the Federal judiciary are fairly available in all geographic areas of the United States, and that the representation of women and minorities among Federal appointments be given close and continuing attention.

So as not to reinvent the wheel, I have attached a copy of the statement which Mr. Friedman gave when he last appeared here on April 1, 1987. In a very real sense, Paul Friedman said it all on that occasion. Very little has changed, and there is very little reason to modify what was said on that occasion.

I simply want to reaffirm, on behalf of the District of Columbia Bar, the points that Mr. Friedman made at that time, and emphasize a couple of them.

First of all, and as this committee well knows, we are concerned about opportunities for members of our bar, who are experienced in practice, to be appointed to the U.S. Court of Appeals for the District of Columbia Circuit, and to the U.S. District Court for the District of Columbia.

We certainly do not suggest that there ought to be a 100 percent local rule with respect to either one of those courts. But we are distressed with respect to the pattern of appointments that has taken place over a number of years.

And we have, I think, an exceptionally well qualified, very large Bar here in the District of Columbia, including, as Mr. Branton has pointed out, a great many very well-qualified blacks, women, and minorities in general.

We see the pattern of appointment, particularly with respect to the court of appeals, as both frustrating and disappointing, and I find it difficult to credit the sort of explanation that Mr. Markman advanced this morning.

It is pretty clear to us that the court of appeals here has become a place where people are put when they cannot be put somewhere else because of problems, whether they be problems of senatorial courtesy or otherwise, out among the various circuits.

I would have to say, however, and emphasize, that this point is not a point of disagreement solely with the Reagan administration. This is something that has been going on for a long time. We do not like it any more, because of that, but it is a long, continued problem.

Our second point, however, is directed at the recent appointment history. We are concerned, and distressed, that all eight appointees to the U.S. Court of Appeals for the District of Columbia, and all six nominees to the district court, have been white males.

Now this is not to suggest that there are not a large enough number of white males to provide very well-qualified appointments for every available vacancy. I think clearly, there are.

But we number among the members of our bar a very large number of women, minorities, blacks, Hispanics. It does not appear to us that any sort of adequate attention is being paid to this enormously talented pool of lawyers. We think the administration is overlooking that pool, and creating the image of a Federal judiciary which is unrepresentative of the population both of the nation, and of the District of Columbia.

As Mr. Friedman has pointed out on prior occasions, the members of the District of Columbia Bar, by and large, have no home State Senator to champion our cause, or to block prospective administration nominations, for whatever reason.

It is for that reason that we continue to turn to the membership of this committee, with its special concerns and responsibilities for the quality and representativeness of the Federal judiciary, for support and encouragement in our efforts to achieve a more equitable distribution of appointments to the Federal courts of the District of Columbia.

We thank you, again, for the chance to be here, and of course are available to answer any questions.

[The prepared statement of Mr. Jordan follows:]

STATEMENT OF ROBERT E. JORDAN III
PRESIDENT OF THE DISTRICT OF COLUMBIA BAR
AT HEARING ON THE PERFORMANCE OF THE REAGAN ADMINISTRATION IN NOMINATING WOMEN AND MINORITIES TO THE FEDERAL BENCH

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FEBRUARY 2, 1988

Mr. Chairman and Members of the Committee:

I am Robert E. Jordan III, and I am currently President of The District of Columbia Bar. The District of Columbia Bar is a so-called mandatory or unified bar composed of all of those licensed to practice law under the jurisdiction of The District of Columbia Court of Appeals. The District of Columbia Bar is the fourth largest bar group in the country, and because of its mandatory nature, it is the largest bar group in the District of Columbia.

This is not the first time a representative of The District of Columbia Bar has appeared to express views before this Committee on the subject of federal judicial appointments. For example, my predecessor, Paul L. Friedman, has appeared twice before you, on October 1, 1986 and on April 1, 1987.

We very much appreciate the fact that the Committee continues to solicit the views of The District of Columbia

Bar on this important subject. The quality of the federal judiciary both here in the District of Columbia, and elsewhere, is obviously important. In addition, it is clearly important that opportunities for appointment to the federal judiciary are fairly available to qualified attorneys in all geographic areas of the United States, and that the representation of women and minorities among federal judicial appointments be given close and continuing attention.

I have attached a copy of the prepared statement of Mr. Friedman when he last appeared before you on April 1, 1987. In a very real sense, Mr. Friedman "said it all" on that occasion. The approach of The District of Columbia Bar, as reported by its Board of Governors, has not altered since Mr. Friedman last spoke before you. Rather than repeat again in my own words each of the thoughts Mr. Friedman expressed on that prior occasion, I wish to simply reaffirm what, to The District of Columbia Bar, are the principal points of concern:

First, we believe that opportunities should be available for members of our Bar experienced in practice locally to be appointed to both the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. Particularly with respect to the United States Court of Appeals, the history of appointments over a great many years has been disappointing and frustrating to members of our Bar. Only rarely are lawyers with significant local practice experience appointed to the Court of Appeals.

Second -- and this is a point directed at recent appointment history -- we are both concerned and distressed that all eight appointees to the United States Court of Appeals for the District of Columbia and all six nominees to the United States District Court for the District of Columbia, have been white males. This is not to suggest that there is not a large enough number of white males to provide extremely well-qualified appointments for every available vacancy. However, we number among the members of our Bar a very large number of women and minorities, including blacks, Hispanics, and others. It does not appear to us that adequate attention is being paid to the enormously talented lawyers available among women and minorities in evaluating potential nominees for judicial positions in the federal courts of the District of Columbia.

We believe that the Administration is overlooking, in large part, this substantial body of legal talent, while at the same time creating an image of the federal judiciary as being, entirely apart from the talents of those who are in fact appointed, unrepresentative of the population of both the Nation and the District of Columbia.

As Mr. Friedman has pointed out, the members of The District of Columbia Bar have no home state Senator to champion our cause, or to block prospective Administration nominees for whatever reason. It is for that reason that we continue to turn to the membership of this Committee, with its special concerns and responsibilities for the quality and representativeness of the federal judiciary, for support and encouragement in our efforts to achieve a more equitable distribution of appointments to the federal courts of the District of Columbia.

We thank you again for the opportunity to be heard, and I am of course available to answer questions which members of the Committee may have.

STATEMENT OF PAUL L. FRIEDMAN
PRESIDENT OF THE DISTRICT OF COLUMBIA BAR
ON THE NOMINATION OF
DAVID B. SENTELLE
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
BEFORE THE
JUDICIARY COMMITTEE
UNITED STATES SENATE
APRIL 1, 1987

Mr. Chairman:

My name is Paul L. Friedman. I am an attorney in the private practice of law in the District of Columbia, a former Assistant United States Attorney here and a former law clerk to a Judge of the United States Court of Appeals for the District of Columbia Circuit. I am currently the President of the District of Columbia Bar, which is now the third largest state bar association in the country, with a membership of over 45,000 lawyers. I appear before the Committee on behalf of the Bar with respect to the nomination of David B. Sentelle to the United States Court of Appeals for the District of Columbia Circuit. I am also authorized to say that the Bar Association of the District of Columbia, the Women's Bar Association, the Washington Bar Association, the Hispanic Bar Association, the Washington Council of Lawyers, the National Lawyers Guild and the Trial Lawyers Association of Metropolitan Washington, D.C. support the Bar's position on this subject.

This is not the first occasion on which the District of Columbia Bar through its President has appeared before this Committee to discuss appointments to the District of Columbia Circuit and the resulting composition of the Court. The Bar has always taken an active interest in the Court and has attempted to make its views known to this Committee, to the White House and to the Justice Department.

Let me make clear that I do not appear before the Committee to challenge the nomination of David Sentelle. The position we take today is one the Bar has espoused for many years and relates only indirectly to Judge Sentelle. As in the past, the individual abilities or intellect of the particular nominee are not the issue. Rather, I appear before the Committee today to challenge the criteria used and, of equal importance, the significant factors wholly ignored by the Executive Branch in making appointments to the D.C. Circuit. The D.C. Bar is concerned over the composition of the Court which has resulted from the application of these criteria by this Administration.

Frequently, the Bar has felt that its plea to be given an appropriate voice in the process and its reflections on criteria pertinent to the appointees have fallen on deaf ears. While our primary concerns remain unanswered, in the case of Judge Sentelle at least members of the Bar and the courts of the District of Columbia have been given an adequate opportunity through the American Bar Association Federal Judiciary Committee to comment on Judge Sentelle's qualifications -- an opportunity not always provided with respect to other recent nominees to the D.C. Circuit in whose cases the process has been much too hurried. In the past the D.C. Bar has also stressed the need to balance the Court with persons who have extensive trial experience rather than primarily academic experience. In that regard, Judge Sentelle's nomination is certainly a step in the right direction; he was a trial lawyer and is now a trial judge. Nevertheless, the D.C. Bar and its members have very serious concerns that have not been addressed and, indeed, have been completely ignored in the case of this and prior appointments.

First, despite the Court's presence in a locale which boasts the third largest state bar association in the country and has 45,000 lawyers licensed to practice here, the current Court includes only one person who is a genuine product of the local legal community. The Bar is distressed by that fact.

Second, despite the large number of women and minority lawyers in the District of Columbia, all eight Reagan appointees to the United States Court of Appeals for the District of Columbia Circuit and all six nominees to the United States District Court for the District of Columbia have been white males. The result of those appointments has been the creation of a Court which represents neither the local community nor the country as a whole.

As I have said, the District of Columbia Bar has a membership in excess of 45,000 lawyers. It includes a wide range of Republicans as well as Democrats, conservatives and liberals, blacks, whites and hispanics, younger and older lawyers, and a large proportion of women in addition to men. Furthermore, the practices of D.C. Bar members are equally diverse, ranging from matters of purely local interest to those of national and international significance. D.C. Bar members are trial lawyers and law professors, experts in administrative law and experts in constitutional law. The D.C. Bar is a fertile source for prime judicial candidates of every vintage, background, gender, race and experience. Yet this enormous pool of legal talent has been largely ignored as a source for appointments to the D.C. Circuit. Instead every President since Franklin Roosevelt has gone outside the District of Columbia to find candidates for the D.C. Circuit. But no President until President Reagan has had eight vacancies to fill.

One argument frequently,made in support of the appointment of non-D.C. lawyers, and the virtual absence of D.C. practitioners from the pool of nominees, is that the D.C. Circuit is a national court. An analysis of the Court's cases may or may not support that premise. The D.C. Circuit undoubtedly hears many cases, most notably appeals from agency action, which have arisen elsewhere and may have little or no connection with purely local concerns. However, the Court also handles both criminal and civil appeals from the United States District Court for the District of Columbia. These cases render the D.C. Circuit functionally indistinguishable from a Circuit Court of Appeals anywhere else in the country, whose judges are selected from the local legal communities within the Circuit and with substantial input from the bars of the affected states.

But even if the D.C. Circuit were viewed as a national court, that fact would only serve to strengthen, not diminish, the argument that nominees to the Court should come from the ranks of D.C. lawyers. Since at least the mid-1960's the District of Columbia Bar has been a truly national bar that includes a large number of lawyers with practices that reach across the country in terms of geography, scope, subject matter and impact. Indeed, many of these lawyers decided to practice law in the nation's capital precisely because of the national practice that has developed here. They are the lawyers best versed in administrative law, constitutional law and in many of the so-called national issues that confront the D.C. Circuit.

If the D.C. Circuit is indeed a national court, the nation as well as this city should not be denied access to the immense talent, experience, diversity and knowledge of members of the D.C. Bar. D.C. Bar members will not be appointed to the federal courts in other jurisdictions. If not appointed to the D.C. Circuit this enormous storehouse of talent will be lost to the federal appellate court system forever.

Furthermore, the District of Columbia Circuit does not deal solely with appeals from decisions of administrative agencies and other national issues. It considers a large number of appeals from the United States District Court for the District of Columbia, including appeals from civil and criminal cases which have been resolved on motion or after trial. It is therefore significant that the D.C. Bar includes a great trial bar which is one of the best sources of talent for appointment to the D.C. Circuit: men and women who understand not only legal theory but the practice of law, the rules of evidence, and civil and criminal procedure. It is also significant that there are many truly outstanding trial judges on our U.S. District Court and outstanding judges on our local trial and appellate courts. What incentive is there for them if none is ever considered for appointment to the U.S. Court of Appeals here?

To be truly great, an appellate court needs a balance which includes some individuals with extensive practical trial experience. The D.C. Circuit could benefit from the addition of more nominees with such experience. So why not "kill two birds with one stone" and elevate a judge from our local or federal trial bench or appoint one of the great trial lawyers of our community? The historical prestige of the D.C. Circuit requires a true blend of all backgrounds. Candidates drawn from the vast resources of the D.C. Bar can undoubtedly add to the prestige of the Court and its stature as a national court.

Failing the "national court" argument as a mechanism for excluding local practitioners, the only one that remains is that of tradition. The D.C. Bar is fully aware that there has been a long practice followed by every President at least since Franklin Roosevelt to look outside the Bar of this city for candidates for appointment to the United States Court of Appeals for the District of Columbia Circuit. Every Administration has to a large extent ignored the talent, experience, diversity and knowledge of the now nearly 45,000 members of our Bar and has opted instead for lawyers from other parts of the country. These individuals, while in many cases extremely talented and capable, nevertheless have been brought to Washington from other jurisdictions, and Judge Sentelle is but another example. Without any real prior knowledge of or experience with the District of Columbia they have been nominated to the D.C. Circuit where they affect the lives and destinies of the citizens of the one jurisdiction that has no elected representative to participate in the advise and consent processes of the United States Senate.

Retired, defeated or incumbent Congressmen from around the country have long constituted one pool of candidates to the D.C. Circuit. President Roosevelt appointed Congressman Fred Vinson of Kentucky, and President Truman nominated Senator Bennett Champ Clark of Missouri. President Eisenhower named Senator John Danaher of Connecticut, and President Nixon appointed former Congressman George MacKinnon of Minnesota. President Carter nominated Congressman Abner Mikva of Illinois, and President Reagan appointed former Senator James Buckley of New York.

At least in recent years, the world of academia has been perhaps the most popular source of candidates for appointment to the D.C. Circuit, but only one President has turned to a local law school for judicial nominees. President Roosevelt selected Professor Henry Edgerton of Cornell and Wiley Rutledge, Dean of the Iowa Law School. President Truman nominated George Thomas Washington, another Cornell professor, and President Kennedy named Carl McGowan, Counsel to the Governor of Illinois and former Northwestern University law professor. President Johnson appointed Spottswood Robinson, who at the time of his appointment to the District Court was Dean of the Howard University Law School. President Carter appointed Harry Edwards from the University of Michigan and Ruth Bader Ginsburg from Columbia. President Reagan has appointed four law professors: Robert Bork from Yale Law School, Antonin Scalia from the

University of Chicago, Stephen Williams from the University of Colorado, and Douglas Ginsburg of Harvard Law School.

There have also been lawyers from other parts of the country brought to Washington to serve briefly in the Justice Department and then appointed to the D.C. Circuit. Over the years such lawyers have included Assistant Attorney General Thurman Arnold of Connecticut, Assistant Attorney General David Bazelon of Illinois, Assistant Attorney General Warren Burger of Minnesota, former Assistant Attorney General Malcolm Wilkey of Texas and most recently, Assistant Attorney General Douglas Ginsburg of Illinois.

Finally, President Kennedy selected a United States District Court Judge from another part of the country for the D.C. Circuit, J. Skelly Wright, at the time a sitting federal judge in Louisiana. And now President Reagan has nominated to our Circuit David Sentelle, currently a U.S. District Court Judge not in the District of Columbia but in Asheville, North Carolina.

Local practitioners have largely been ignored in all of this. There have been a few appointed, but not many. Yet they have been among the stalwarts of the Court: E. Barrett Prettyman, James Proctor, Walter Bastian, Harold Leventhal, Roger Robb and Patricia Wald. But a handful in half a century is not a record of which to be proud. It is a record about which our Bar has grown increasingly concerned and for which there now appears to be no rational basis, if indeed one ever existed.

So far as history shows, no President has thought it important even to consider the local ties of any of his nominees to the federal appellate court here. Knowledge of the District of Columbia and its laws and commitment to the District and its people all seem to have been ignored. Many recent appointees to the Court have never even been admitted to practice law here, much less before the very Court on which they were appointed to serve. Judge Sentelle is no exception. Rather, with no Senatorial courtesy (indeed, no Senator at all) to protect District of Columbia residents, Presidents and Attorneys General for half a century have nominated to the D.C. Circuit whomever they chose from wherever they happened to hail. President Reagan has even appointed three individuals to our Circuit whose state Senators apparently had rejected them for appointment to the Circuit from which they came.

We in the District of Columbia have no home state Senator to either block or champion a particular nominee. We have no senatorial privilege to assure that D.C. lawyers will not be closed out of our own judiciary. We do, however, have a very distinguished and increasingly frustrated Bar that is tired of being ignored when it comes to appointments to our own Circuit.

I am not arguing that the D.C. Circuit should be composed solely of lawyers from the D.C. Bar or solely of lawyers with substantial ties to this jurisdiction. I strongly suggest, however, that it is time for this Administration and those that follow to break with the irrational and unsupportable tradition of the past and to look first and foremost to members of our Bar for nominees to the D.C. Circuit. The Reagan Administration has ignored that plea on each of the eight occasions when there has been a vacancy on the Court. I urge this Committee to join the D.C. Bar in sending it the message I am suggesting.

I would also urge this Committee to look very closely at the present composition of the United States Court of Appeals for the District of Columbia Circuit. The Court currently lacks balance. During his Administration, President Reagan has nominated eight white males to the D.C. Circuit. During his Administration he has nominated six white males to the U.S. District Court for the District of Columbia. While many of these men have already demonstrated that they are outstanding judges, the point is that the President has nominated no women, no blacks and no hispanics in a city whose population is seventy percent black. It is high time that the race and gender of appointees to the Court be scrutinized and efforts made to assure that the composition of the Court reflects the country, the community and the legal environment in which it functions. The country, the city and the legal profession are not comprised solely of white males.

The District of Columbia Bar undoubtedly contains one of the largest single pools of women and minority lawyers in the country, including approximately 8,000 to 10,000 women, 2,500 black and 600 hispanic lawyers. These women and minorities represent a disproportionately high number of the women and minority group members currently licensed to practice law in the United States. They range from private practitioners to government officials and are diverse in terms both of seniority and experience and of social and political philosophies and perspectives.

Women and minorities can be found among both the senior and junior partners at this city's largest and most prestigious law firms. Indeed Washington has the largest number of both women partners and minority partners at major law firms of any city in the country. The federal and D.C. governments also contain highly qualified women and minority lawyers at all levels of seniority and responsibility, as does the local judiciary. The leadership of the D.C. Bar itself reflects the diversity of the D.C. legal community, having been led last year by Fred Abramson, a black attorney, and the preceding year by Marna Tucker, a woman. Of 20 officers and members, the Board of Governors of the D.C. Bar includes ten women and six minority lawyers.

But even accepting the Reagan Administration policy of seeking judicial appointees from outside the ranks of local lawyers, women and minority lawyers as a whole should not be disqualified. Over 103,000 women, 25,000 black and 11,000 hispanic lawyers are licensed to practice law in the United States. Many of these are seasoned, bright and well qualified to serve at the federal appellate level. With the enormous diversity which this group of women and minority lawyers represents it should be possible to locate and nominate to the D.C. Circuit women and minority lawyers who are in tune with the philosophy of whichever Administration happens to be in office at the time.

In sum, right here in the District of Columbia are the talent, the diversity and the experience necessary to enable any Administration to select those who meet its particular tests for appointment and at the same time to assure that the United States Court of Appeals for the District of Columbia Circuit, the second most important court in the country, continues to be inhabited by the best and the brightest, by men, women, blacks and other minorities. This is an issue of great importance to the Bar, this city and, ultimately, to the credibility and prestige of the Court.

The Bar appreciates the opportunity to make its views known and certainly to have those views seriously considered in the federal judicial appointment process. So, on behalf of the

D.C. Bar, I thank you for the opportunity to appear and I again strongly urge the Committee and the Administration to look in the first instance to the District of Columbia Bench and Bar as a source for appointments to the United States Court of Appeals for the District of Columbia Circuit. I also ask that you consider carefully the makeup of the Court today. It is essential that women and minorities be included among its members to assure the necessary balance and credibility which are essential to its continued prestige and effective functioning.

Thank you.

Senator **Kennedy**. Thank you very much. Ms. Schroeder.

STATEMENT OF MARTHA SAENZ-SCHROEDER, PRESIDENT, WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Ms. **Saenz-Schroeder**. Thank you, Mr. Chairman.

I am pleased to be here today in my capacity as president of the Women's Bar Association of the District of Columbia. Our bar association was founded in 1917, when no other bar associations in this area admitted women.

We are one of the oldest, and in numbers, the largest women's bar association in the country, with a current membership of 1,450 members.

Our members include both men and women who are lawyers and judges, and who work in law firms, Government, corporations, trade associations, and solo practice.

I am the first Hispanic to be president of the association, and have been a member since November 1980, when I was admitted to the District of Columbia Bar.

The Women's Bar Association has, as one of its main purposes, the advancement of women in the legal profession. Among our 24 committees are special ones for judicial endorsements, executive endorsements, and legislative issues.

We monitor legislation affecting women, as well as judicial appointments to the Federal, State, and local courts. It is this very issue which brings me here today.

From the record, it is clear that in spite of the greatly increased number of qualified women judges, and lawyers available, far too few women have been selected for the bench by the administration.

As it has been said before during the testimony we heard this morning, during President Reagan's entire term of office, he has appointed only 31 women to serve as judges in the Federal courts, which is fewer than the previous administration, when 40 were appointed in just one Presidential term, with a smaller pool of potential candidates.

A relevant and significant factor to be considered is the large number of women who have entered the legal profession since 1973, making that pool of qualified candidates substantial.

In a recent study published by the American Bar Foundation, it was shown that from 1951 to 1984, the proportion of lawyers who were women grew from about 5,500 in 1951 to almost ten thousand in 1970, 44,185 by 1980, and to an estimated 83,000 by 1984.

Of course the more current statistics bring the number of women lawyers to approximately 111,000 by 1986.

This growth represents an increase in the proportion of women lawyers, that in 1951 was 2.5 percent; it increased to 13 percent of the lawyer population by 1984, and by 1986, it was up to 18 percent.

Yet the professional advancement which is symbolized by judicial appointment has been denied to women, even as their membership in the legal profession has grown significantly.

The Women's Bar Association also conducted a survey of its own members in the fall of 1985. I would like to share some of those findings with you. On the issue of legal experience, the largest group, or 46.93 percent, had already been in practice from 6 to 10 years. Almost 80 percent of the respondents worked full time. The median age was the age group of 30 to 37-years-old. About 40 percent worked for the Government, 31 percent were in law firms 9 percent were in solo practice, and 5 percent in corporations.

By now women lawyers have certainly been in the profession in sufficient numbers, and long enough to have acquired the credentials necessary for serious consideration to all judicial appointments including the Supreme Court.

While we applauded the historic appointment of Justice Sandra Day O'Connor to the Supreme Court in 1981, President Reagan has certainly not continued in the spirit of that appointment in the subsequent years of his administration.

The 31 women he has named constitute only 8.2 percent of the total judges he has appointed, with men constituting 91.8 percent. By comparison, President Carter's 40 appointments constituted 15.5 percent of the total judges he appointed.

At this point we must recognize that women lawyers are at least 18 percent of the lawyer population, and that women constitute more than 50 percent of the country's population. But we must think of it not as an issue of quotas.

It is a human issue because judges, at all court levels, are essentially resolving human problems, and need to bring diverse perspectives to their legal analyses.

Women and minorities are members of the society as a whole, and should not be excluded from participation in the various branches of government.

Furthermore, women lawyers, who are an ever-growing proportion of the legal profession, should not be excluded from serving as members of the judiciary in the decisions that affect us all.

The failure to seek out members of these under-represented groups, or even to consider sources that include likely candidates from these groups, has serious consequences.

First, and most obviously, the administration is overlooking talented lawyers who could help interpret the law to meet the needs of our changing society.

Second, by failing to appoint women and minority members to some of society's most prestigious and powerful positions, one discourages other members of these groups from trying to achieve because the goals are perpetuated as unattainable.

We do our Nation a great disservice when we fail to show our future leaders that their abilities will be recognized.

As a practical matter, we propose that the administration seek qualified candidates for appointment by consulting with professional groups, and exert true outreach efforts to identify the best candidates from all segments of our society.

Our association had 31 charter members in 1917, ironically, the same number of women that the Reagan administration had appointed 70 years later to judicial positions.

To select such a small number of women appointees, during 7 years in office, when so many vacancies have occurred, has effectively excluded many excellent women from professional advancement.

With approximately 10,000 women attorneys practicing in the Washington Metropolitan area, we know that there are many women with the talent, the legal temperament, the experience, and the professionalism to be excellent judges.

In addition, there are already many women sitting as judges who merit appointment to higher courts. It is time that these women of talent be recognized for judicial appointment for the future benefit of us all.

Before I close my remarks, I would like to add three significant answers to some of the questions that were raised earlier this morning. One of the studies that has been done on the Reagan appointees in the second term show that during the second term there has been a tendency to appoint men who are younger, and who are actually under 40 years old, and the median age for the lawyers in our association happens to be under 40.

Second of all, Senator Thurmond pointed out that it is not the quantity of experience that makes an outstanding lawyer or an outstanding judge, but the quality of that experience, and at this point the women lawyers have had not only the quality but the quantity of experience which the Reagan administration claims is a necessary requisite to appointment.

And third of all, I would like to point out that in another study made on the Reagan appointees, it was mentioned that not since Warren Harding's administration, has an administration refused to appoint any qualified members from the opposition party.

We know very well, that there are many qualified women, that there are many qualified members of minority groups, and that they have not been given a chance to participate in one of the most important aspects of our society, the judiciary. Thank you.

[The prepared statement of Ms. Saenz-Schroeder and response to questions follow:]

The Women's Bar Association
of the
District of Columbia
1819 H Street N.W., Suite 1250
Washington, D.C. 20006

(202) 785-1540

TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

BY MARTHA SAENZ-SCHROEDER, PRESIDENT 1987-1988

My name is Martha Saenz-Schroeder. I am pleased to be here today in my capacity as President of the Women's Bar Association of the District of Columbia. Our bar association was founded in 1917 when no other bar associations in this area admitted women. We are one of the oldest, and in numbers, the largest women's bar association in the country with a current membership of 1450. Our members include both men ahd women who are lawyers and judges, and who work in law firms, government, corporations, trade association, and sole practice. I am the first Hispanic to be president of the association, and have been a member since November 1980 when I was admitted to the District of Columbia Bar.

The Women's Bar Association has as one of its main purposes the advancement of women in the legal profession. Among our 24 committees, are special ones for Judicial Endorsements, Executive Endorsements, and Legislative Issues. We monitor legislation affecting women as well as judicial appointments to the Federal, state and local courts. It is this very issue which brings me here today.

From the record, it is clear that in spite of the greatly increased number of qualified women judges and lawyers available, far too few women have been selected for the bench by the Administration. During President Reagan's entire term of office, he has appointed only 31 women to serve as judges in the Federal courts, which is fewer than the previous administration when 40 were appointed in just one presidential term with a smaller pool of potential candidates.

A relevant and significant factor to be considered is the large number of women who have entered the legal profession since 1973, making that pool of qualified candidates substantial. In a recent study published by the American Bar Foundation, it was shown that from 1951 to 1984 the proportion of lawyers who were women "...grew from about 5,500 in 1951; to almost 10,000 in 1970; to 44,185 by 1980; and to an estimated 83,000 by 1984." (The Lawyer Statistical Report: A Statistical Profile of the U.S. Legal Profession in the 1980's by Barbara A. Curran with Katherine J. Rosich, Clara N. Carson and Mark C. Puccetti, p. 9.) This growth represented an increase in the proportion of women lawyers from 2.5% in 1951 to an estimated 13% of the lawyer population by 1984. Yet the professional advancement which is symbolised by judicial appointment has been denied to women even as their membership in the legal profession has grown significantly.

The Women's Bar Association also conducted a survey of its members in the fall of 1985. I would like to share with you some illustrative findings. On the issue of legal experience, the largest group, or 46.93% had already been in practice from 6 to 10 years. Almost 80% of the respondents worked full-time. The median age was the age group of 30 to 37 years old. About 40% worked for the government, 31% were in law firms, 9% were in sole practice, and 5% were in corporations. By now, women lawyers have been in the profession in sufficient numbers and long enough to have acquired the credentials necessary for serious consideration to all judicial appointments, including the Supreme Court. While we applauded the historic appointment of Justice Sandra Day O'Connor to the Supreme Court in 1981, President Reagan has not continued in the spirit of that appointment in the subsequent years of his administration. The 31 women he has named constitute only 8.2% of the total judges he has appointed, with men constituting 91.8%. By comparison, President Carter's 40 appointments constituted 15.5% of the total judges he appointed. By 1986, the 111,000 women in the legal profession constituted 18% of the lawyers, and women constitute more than 50% of the country's population.

This is not an issue of quotas--it is a human issue because judges at all court levels are essentially resolving human problems and need to bring diverse perspectives to their legal analyses. Women and minorities are members of the society as a whole and should not be excluded from participation in the various branches of government. Furthermore, women lawyers, who are an ever-growing proportion of the legal profession should not be excluded from serving as members of the judiciary in the decisions that affect us all.

The failure to seek out members of these underrepresented groups, or even to consider sources that include likely candidates from these groups, has serious consequences. First and most obviously, the Administration is overlooking talented lawyers who could help interpret the law to meet the needs of our changing society. Second, by failing to appoint women and minority members to some of society's most prestigious and powerful positions, one discourages other members of these groups from trying to achieve because the goals are perpetuated as unattainable. We do our nation a great disservice when we fail to show our future leaders that their abilities will be recognized.

As a practical matter, we propose that the Administration seek qualified candidates for appointment by consulting with professional groups, and exert true outreach efforts to identify the best candidates from all segments of our society. Our Association had 31 charter members in 1917, even at a time before women had the right to vote in this country. And now 70 years later, there have only been 31 women total appointed to judicial positions in this Administration. To select such a small number of women appointees during seven years in office when so many vacancies have occurred, has effectively excluded many excellent women from professional advancement. With approximately 10,000 women attorneys practicing in the Washington metropolitan area--we know that there are many women with the talent, the legal temperament, the experience and the professionalism to be excellent judges. In addition, there are many women sitting as judges who merit appointment to higher courts. It is time that these women of talent be recognized for judicial appointment for the future benefit of us all. Thank you.

February 1, 1988

The Women's Bar Association
of the
District of Columbia
1819 H Street N.W., Suite 1250
Washington, D.C. 20006

(202) 785-1540

February 26, 1988

Senator Joseph R. Biden, Jr.
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Senator Biden:

This letter shall serve as our response to the written questions submitted by Senator Charles Grassley after the February 2nd hearing on the judicial selection process.

Historically, the Women's Bar Association has not actively opposed the appointment of a particular individual to a judgeship in the District of Columbia. However, we have recently joined the District of Columbia Bar and other local voluntary bar associations in voicing our collective concern about the Reagan administration's failure to appoint to the Federal bench persons with local ties to the District of Columbia. One of the reasons for us to voice these concerns is that this administration, by looking elsewhere for judicial candidates, has ignored the many fine minority and female attorneys who are members of the District of Columbia Bar. Such nominations as those of Judges Ruth Bader Ginsburg and Harry Edwards to the Circuit Court were welcome; not only were they excellent candidates, but also their appointments brought needed representation of minority and women judges to the Federal bench.

To respond more generally to Senator Grassley's question regarding our more recent advocacy position, we would note that this issue has been one of increasing concern during the Reagan administration. The number of judges on the federal bench was quite small prior to 1977; the federal judiciary was greatly expanded by acts of Congress during the Carter administration. It is only in the last ten years, therefore, that there has been a large number of appointments to the federal bench here about which to become concerned. President Carter's history of appointing women and minorities generally, and District of Columbia residents in particular, was good, but President Reagan's record has been quite poor.

It is also significant that the years of the expanded federal judiciary have coincided with the advent of home rule in the District of Columbia and the consequent general expectation on the part of residents of the District of Columbia that they will play a role in deciding their own destinies. Before the Home Rule Act went into effect, District of Columbia residents were well aware that this was a federal enclave and that they had little or no voice in their own government. Congress' grant of limited home rule to the District of Columbia, coupled with a general hands-off policy on Congress' part which has manifested itself during the fifteen years of home rule (almost none of the D.C. City Council's enactments are rejected by Congress), has made the lack of local control over, and involvement in, the federal judiciary even more obvious. Under the circumstances, it is not surprising that the agitation on behalf of a more locally-based federal judiciary has begun only recently.

We trust this responds to Senator Grassley's questions, and we thank you for affording our organization the opportunity to present testimony on this topic of interest and concern to us.

Sincerely,

Martha Saenz-Schroeder

Martha Saenz-Schroeder,
President

Senator KENNEDY. You know, of course, that that is not so. I remember, from personal experience of mine, when Senator Tunney was a Senator, and under the Republican administration, in California they had two Democratic Senators, and it was understood that they would name two Republicans and one Democrat, and that was the pattern all during the period of the Nixon administration.[1]

Mr. Mitchell.

STATEMENT OF IVERSON O. MITCHELL III, PAST PRESIDENT, WASHINGTON BAR ASSOCIATION

Mr. MITCHELL. Thank you, Senator. Again, for the record, my name is Iverson Mitchell, and I am a member of the law firm Speights & Micheel. I served as president of the Washington Bar Association from 1982 to 1984.

I am standing in today for our president, Nathaniel Speights who was unable to be here because of a prior commitment.

The Washington Bar Association is America's oldest and largest local voluntary bar founded by black lawyers. We are an affiliate of the National Bar Association in whose comments earlier today we join.

As you are well aware, our bar association was founded because segregation prevented participation of black lawyers in legal affairs affecting the bench.

As we have on previous occasions before this committee, we join with the other voluntary bar associations and with the unified D.C. Bar, to oppose a policy and procedure which prevents citizens of the District of Columbia from meaningful participation in the selection of Federal judges.

We of course realize that citizens of the District of Columbia have no elected representative in the U.S. Senate. Thus we realize it is not possible to exercise the privilege of Senatorial courtesy with respect to the appointment of Federal judges.

Our bar association believes that the practice of law within the District of Columbia requires the highest level of expertise.

This is not simply because the Federal Government is here, though to be sure, that is a significant factor, but also because Washington has become the most important city in the free world. Nearly all commerce, diplomacy and trade, at some time requires a Washington contact. My firm, like many others in Washington, has a large base of clients from outside the jurisdiction as well as our local practice.

The value of a Washington lawyer in the marketplace is obvious. Nonetheless, this large pool of lawyers with national Federal expertise has historically been disenfranchised by the Senate, the President and the Washington Bar Association.

The Federal courts in the District of Columbia have in recent years become the bench used to appoint those who are unable to pass political or judicial muster within their home State. We join the unified bar and the other voluntary associations in condemning this practice.

---

[1] The statement regarding the non-appointment of opposition party members referred to appointments for the appeals courts. Off-the record, Ms. Saenz-Schroeder clarified this point with Senator Kennedy. The article was in the April–May 1987 issue of "Judicature" (Vol. 70, No. 6) at p. 334, "Reagan's Second Term Judicial Appointments: the Battle at Midway" by Sheldon Goldman.

History tells us that at least every President since Franklin D. Roosevelt has made it a practice to nominate individuals to the U.S. Court of Appeals for the District of Columbia Circuit, who are not members of the District of Columbia Bar and are not products of the local legal community.

We are also aware that the D.C. Circuit is looked upon as a national court due to the nature of the cases which come before it.

Even so, we find especially disconcerting that the Reagan administration has consistently looked outside of the Washington Metropolitan Area to fill vacancies on the D.C. Circuit, and the administration's nominations have exclusively been of white males.

The vacancy created by the recent resignation of Judge Bork presents the Reagan administration with what might be its last opportunity to address the concerns that we, and the other bar associations have raised previously before this committee.

In addition to the many qualified judges presently sitting on the local courts, and in the U.S. District Court, there are 45,000 members of the D.C. Bar from which to select a nominee. Of these 45,000 members, 8,000 are women and 3,000 are black or Hispanic.

We recognize that a President is likely to nominate for judgeships those persons who agree with that administration's philosophies, but surely, with the large local pool of lawyers and judges in the District of Columbia, there are individuals qualified to be judges who also happen to agree with this administration's judicial philosophy.

As to the broader question of President Reagan's overall record of judicial nominations, we also would like to use this opportunity, as a minority bar association, to express our dismay over the fact that out of 287 judicial nominations by the Reagan administration, only 5 have been black.

If the administration is so willing, the Washington Bar Association would be more than happy to confer with Assistant Attorney General Markman to help identify individuals for consideration for the next court vacancy. We have our own standing committee for judicial nominations which can provide the administration with names of qualified minority candidates.

We thank the committee for giving us this opportunity to express our views.

[The prepared statement of Mr. Mitchell follows:]

THE WASHINGTON BAR ASSOCIATION

P.O. BOX 56551 • WASHINGTON, D.C. 20040 • (202) 289 4247

Dedicated to the principle *"Equal Justice Under Law"*

OFFICERS (1986-87)

Nathanial H. Speights
President
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 737-5708

Leland Ware
Vice President

Roberta Willis Sims
Vice President

Linda A. Aikens
Vice President

Michael M. Hicks
Vice President

Joseph H. Hairston
Treasurer

Jacqueline A. Reed
Secretary

BOARD OF DIRECTORS

Leland Ware
man

A. Aikens
J. Davis
Joseph H. Hairston
Michael M. Hicks
Cheryl M. Long
Patricia A. Moore
Thomas H. Queen
Jacqueline A. Reed
Roberta Willis Sims
Nathaniel H. Speights
Vannie Taylor, III
Wendell W. Webster

COUNCIL OF PAST PRESIDENTS

John A. Turner, Jr.
Iverson O. Mitchell, III
Thomas A. Duckenfield
J. Clay Smith, Jr.
Ruth E. Hankins-Nesbitt

STATEMENT OF IVERSON O. MITCHELL, III
ON BEHALF OF
THE WASHINGTON BAR ASSOCIATION
BEFORE THE
JUDICIARY COMMITTEE
UNITED STATES SENATE
FEBRUARY 2, 1988

Mr. Chairman:

My name is Iverson O. Mitchell, III. I served as President of the Washington Bar Association from 1982-1984. The Association is America's oldest and largest local voluntary bar founded by Black lawyers. We are an affiliate of the National Bar Association. As you are well aware, our Bar Association was founded because segregation prevented participation of Black lawyers in legal affairs affecting the Bench. As we have on previous occasions before this Committee, we join with the other voluntary bar associations and with the unified D.C. Bar to oppose a policy and procedure which prevents citizens of the District of Columbia from meaningful participation in the selection of Federal Judges.

We of course realize that citizens of the District of Columbia have no elected representative in the United States Senate. Thus we realize it is not possible to exercise the privilege of Senatorial courtesy with respect to the appointment of Federal Judges.

Our bar association believes that the practice of law within the District of Columbia requires the highest level of expertise. This is not simply because the federal government is here, though to be sure that is a significant factor, but also because Washington has become the most important city in the free world. Nearly all commerce, diplomacy and trade at some time requires a Washington contact. My firm, like many others in Washington, has a large base of clients from outside the jurisdiction as well as our local practice.

The value of a "Washington Lawyer" in the market place is obvious, nonetheless this large pool of lawyers with national/federal expertise has historically been disenfranchised by the Senate, the President and the Attorney General. The federal courts in the District of Columbia have in recent years become the Bench used to appoint those who are unable to pass political or judicial muster within their home state. We join the unified bar and the other voluntary associations in condemning this practice.

History tells us that at least every President since Franklin D. Roosevelt has made it a practice to nominate individuals to the United States Court of Appeals for the

District of Columbia Circuit who are not members of the District of Columbia Bar and are not products of the local legal community. We are also aware that the D.C. Circuit is looked upon as a national court due to the nature of the cases which come before it.

Even so, we find especially disconcerting that the Reagan administration has consistently looked outside of the Washington metropolitan area to fill vacancies on the D.C. Circuit and the nominations have exclusively been of white males.

The vacancy created by the recent resignation of Judge Bork presents the Reagan administration with what might be its last opportunity to address the concerns we and the other bar associations have raised. In addition to the many qualified judges presently sitting on the local courts and in the U.S. District Court, there are 45,000 members of the D.C. Bar from which to select a nominee. Of those 45,00 members, 8,000 are women and 3,000 are black or hispanic.

We recognize that a President is likely to nominate for judgeships those persons who agree with the administration's philosophies. But surely with the large local pool of lawyers and judges in the District of Columbia there are individuals qualified to be judges who also agree with this administration's judicial philosophy.

Although this hearing is for addressing the issue of appointments to the D.C. Circuit, we also would like to use this opportunity as a minority bar association to express our dismay over the fact that out of 287 judicial nominations by the Reagan administration, only five have been black.

If the administration is so willing, the Washington Bar Association would be more than happy to confer with Assistant Attorney General Markman to help identify individuals for consideration for the next court vacancy. We have our own standing committee for judicial nominations which can provide the administration with names of qualified minority candidates.

We thank the Committee for giving us this opportunity to express our views.

Senator **KENNEDY**. Thank you very much. Let me, Ms. Schroeder, just start with you.

Ms. **SAENZ-SCHROEDER**. Yes?

Senator **KENNEDY**. Given the criteria that have been announced even by this administration—whether we agree with it or not—I do not—but let's accept it just as their criteria—do you think that you could find qualified women that meet the criteria of having a conservative philosophy, that still have the requisite qualities to serve with distinction here in the district, either on the district or circuit court?

Ms. **SAENZ-SCHROEDER**. I believe that we could. I also would like to explain that in the 2 years that I have been a member of the board of directors of our association, we have not been formally asked for any type of recommendation of potential candidates.

Senator **KENNEDY**. Mr. Jordan, do you think that, speaking for the D.C. Bar that you could make recommendations of well-qualified lawyers, that even under the administration's criteria, would be qualified to serve with distinction?

Mr. **JORDAN**. I do not have any doubt that we could create a list. As a mandatory or unified bar, we typically do not make specific recommendations because our people have to belong. It is kind of a first amendment issue. But if anybody comes to me I can point them to a large number of people who are not subject to that constraint, all of whom will be able to give them a very solid and substantial list.

Senator **KENNEDY**. Talking about minorities and women?

Mr. **JORDAN**. Minorities and women. That is correct.

Senator **KENNEDY**. Mr. Branton, you have an unusual position because your particular responsibilities have been set up under the home rule legislation, and therefore, it is by statutory design, the will of Congress, that you have your responsibilities to live up to.

Do you believe, as well, that there are ample qualified minorities and women, that could serve with distinction, that you could recommend to the administration were it to solicit names, that would meet the overall philosophical views, of this administration?

Mr. **BRANTON**. The general answer would be yes, we can. If I understand party affiliation to be a complete barrier, the answer is I do not know, because we never inquire as to the political affiliation of any of the applicants who come before us.

Senator **KENNEDY**. Mr. Mitchell, the same question to you. Do you think, in terms of your own association, as well as those that you know outside the association, that you could recommend well-qualified individuals, women and minorities to serve in a D.C. Court?

Mr. **MITCHELL**. Yes, Senator Kennedy, I do believe that to be the case, and certainly if we were asked—and to my knowledge we have not been asked—but if we were asked, I believe we could supply a list of qualified candidates.

Senator **KENNEDY**. Okay. Well, I want to thank all of you very much for your presence here and for your testimony. I think it is quite clear that there has not been any reasonable outreach to the various groups and associations, certainly here in the District.

And I had my own conversation with Mr. Meese, requesting, at the Justice Department—at my request—to discuss this very issue.

He had given me assurances at that time that they would engage in outreach. And it is quite apparent that they have not, and this obviously is troublesome. It is apparent to us that the statements that have been made by the President and Mr. Meese, made during the course of one in a political campaign, and the other prior to the time of confirmation, that evidently they believe that that is what the desire of the American people is, and yet once we find that they have gained office, that effectively, they have given short shrift to the concept.

And as a result, I think the whole process has been, in that respect, badly tainted. It is difficult, obviously, from our point of view, as we look at individuals, to be able to say, well, because although that person has qualifications, he is not a woman or a minority and therefore, we ought to vote in opposition to such an individual. But the evidence, I think, in looking at the statistics and at the availability of qualified people, and at their desire to serve in the judiciary, is compelling, that the record of the administration falls far short of trying to reflect, in a meaningful way, the composition of the American people in these judicial positions.

I would hope that this committee would spend its time now, as we come to the end of the session, to try and see what can be done in the final period of this administration to improve this record.

That would certainly be my view, and I will talk to my colleagues about it. I want to thank all of you very much.

The committee stands in recess.

[Whereupon, the committee was adjourned, subject to the call of the Chair.]

○